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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GUILLERM A. SAAVEDRA,
individually and doing business
as SAAGAN MOVING & STORAGE COMPANY,

Petitioner,

v.

RAYMOND J. DONOVAN, Secretary
of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Storage Company

QUESTIONS PRESENTED FOR REVIEW

1. Where a regulation of the Secretary of Labor provided that the findings of fact of an Administrative Law Judge ("ALJ") could only be set aside if "clearly erroneous," did the court of appeals err in declining to review the decision of the ALJ and limiting judicial review to a determination of whether there was substantial evidence to support the findings of the reviewing authority?

2. Where a government contract was replete with ambiguities which misled petitioner, a first-time government contractor, did the court of appeals err in holding that the ambiguities in the contract need not be construed against the drafter?

3. Where the Department of Labor determined the liability of a government contractor for employee benefits under

the Service Contract Act pursuant to procedures prescribed by an unpublished opinion of a subordinate official of DOL, of which neither the contractor nor the general public had notice, did the court of appeals err in approving such practices in the absence of any statutory or regulatory authority for such procedures?

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PETITION FOR WRIT OF CERTIORARI TO THE

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GUILLERMO A. SAAVEDRA, individually and doing business as SAAGAN MOVING & STORAGE COMPANY, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1/ In addition to respondent the proceeding below was against DONALD ELISBURG, Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor, and NAHUM LITT, Chief Administrative Law Judge, Department of Labor.

1. OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A) is reported at 700 F.2d 496 (9th Cir. 1983). The district court, the United States District Court for the Northern District of California, rendered no opinion. The opinion of the Administrative Law Judge of the Department of Labor was not reported but is set forth in Appendix C. The decision of the Secretary of Labor's Administrator, Wage and Hour Division, Employment Standards Administration was not reported but is set forth in Appendix C-1.

2. JURISDICTION

A. The judgment of the Court of Appeals for the Ninth Circuit was filed and entered February 4. 1983.

B. The Order of the Court of Appeals denying a petition for rehearing

was filed April 15, 1983.

C. Jurisdiction of this Court is based on 28 USC § 1254(1).

3. STATUTES AND REGULATIONS INVOLVED

This case involves the McNamara - O'Hara Service Contract Act, as amended, 41 USC §§ 351-358, and regulations promulgated by the Secretary of Labor implementing the Act, 29 CFR, Part 4, and establishing hearing procedures and review of such hearings by the Secretary, 29 CFR, Part 6. The relevant sections of the Service Contract Act are included in Appendix D and the relevant regulations are included in Appendix E.

The case also involves questions of agency responsibility to make available to the public its rules and regulations and opinions. Title 5 USC, § 552 provides:

> " **§ 552. Public information; agency rules, opinions, orders, records, and proceedings**
> (a) Each agency shall make available

to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

* * *

(D) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying --

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. ---Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. --- A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if --

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

* * *

Judicial review of the administrative process was under 5 USC § 706, which provides:

" § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determina-

tions, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of preducicial error."

4. STATEMENT OF THE CASE

A. BASIS OF JURISDICTION IN THE DISTRICT COURT

Petitioner, Guillermo A. Saavedra, individually and doing business as Saagan Moving & Storage Company (plaintiff and appellant below) brought this action against the Secretary of Labor (hereafter "Secretary") and subordinate officials of the Department of Labor (hereafter "DOL") to obtain relief setting aside the decision of the Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor (hereafter "Administrator"), reinstating those portions of a decision of an Administrative Law Judge (hereafter "ALJ") which had been reversed by the Administrator and ordering

the Secretary to direct the release to plaintiff of over $35,000 withheld from plaintiff by the General Services Administration (hereafter "GSA") at the direction of DOL. Jurisdiction in the district court was based on 28 USC §1331 (civil action arising under the laws of the United States where the amount in controversy was in excess of $10,000), 28 USC § 1361 (action to compel officers of the United States to perform duties owed to plaintiff), 28 USC §1651 (action to obtain writs of mandamus, progibition and injunction), and 5 USC §§701-706 (suit to review and compel agency action).

B. SUMMARY OF PROCEEDINGS BELOW

This case had its origins in administrative proceedings of DOL, where, on August 30, 1977, a complaint was filed by DOL alleging that petitioner had violated the McNamara-O'Hara Service Contract

Act, as amended, 41 USC §§351-358, (hereafter sometimes referred to as the "Service Contract Act", the "Act". or "SCA" , regulations issued thereunder, 21 CFR, Part 4, by failing to pay wages and fringe benefits as required under government contracts held by petitioner, and alleging that petitioner was liable for such alleged under-payments as provided in 41 USC §352(a) and was subject to the provisions of 41 USC §354(a) whereby petitioner could be barred from any contract with the United States for three years for violating the Act.

Petitioner was, and is, an individual, doing business in San Francisco as Saagan Moving & Storage Company, and was from July 1, 1975 through June 30, 1977, a government contractor under two successive one year contracts awarded by GSA, whereby petitioner was to perform moving

and related service in San Francisco (Contracts GS-09T-38, July 1, 1975 - June 30, 1976 and GS-09T-67, July 1, 1965 - June 30, 1977; hereafter referred to as "contract 38" and "contract 67", respectively).2/

Petitioner denied the allegations in the administrative complaint and raised affirmative defenses, including defenses that both contracts were vague and ambiguous and should be contrued strictly against the preparer; that eligibility for benefits under SCA should be determined by the amount of work done, under the government contracts and should be paid only

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2/ The provisions of the Service Contract Act were incorporated into contracts 38 and 67, and each contract included enumerated revisions of "Wage Determination 66-190," prepared and issued by the Department of Labor. Contract 38 included Revision 9 of said wage determination and contract 67 included Revision 11 of said wage determination. The aforesaid wage determinations purported to establish wages and fringe benefits for employees of petitioner who performed work under the GSA contracts, though such wage determinations were not applicable to general commercial work performed by the same employees for petitioner.

for work done under the contracts. Petitioner also claimed that unusual circumstances existed which precluded debarment under 41 USC §354(a).

On November 9, 1977, an evidentiary hearing was held before the Honorable Thomas Schneider, ALJ, in San Francisco, at which time witnesses were called and testified on behalf of the respective parties and documentary evidence was introduced. Thereafter the parties submitted briefs and declarations and additional documentary evidence was filed and all such evidence, documents, briefs and declarations were made part of the record. On April 10, 1978, Judge Schneider rendered a fourteen page Decision and Order (Appendix C) which thoroughly analyzed the facts as presented to him. Judge Schneider essentially found for petitioner as to all material issues of fact and law except as to two

issues and as to those, partial findings in petitioner's favor were made. It was ordered that the Department of Labor recompute the amounts due from petitioner, consistant with the ALJ's opinion, and that petitioner be paid any excess due to him from money which had been withheld by agreement under the contracts.3/ Judge Schneider further recommended that though petitioner had violated the Act, the Secretary of Labor take affirmative action to relieve him from the ineligibility provisions of 41 USC §354(a).

In the words of the Court of Appeals (Appendix A, p.3):

> "The --- ALJ concluded that Saavedra was bound by and had violated the wage determination and must re-

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3/ During the course of the administrative proceedings, petitioner and DOL entered into an agreement, whereby GSA withheld over $35,000 from petitoner which otherwise would have been due and owing under petitioner's contracts.

> compense the affected employees. But he thought the contracts confusing, sloppy, and rife with mistakes. Provisions that he thought ambiguous as to computation of amounts due he interpreted in Saavedra's favor."

In reaching his decision, the ALJ found that an unpublished letter of an assistant administrator used by DOL to compute benefits was not binding on petitioner and its use was not supported in fact or law; moreover in light of the general unavailability of prior administrative decisions interpreting the SCA, such decisions had no precedential value; and, finally, applying the rule of contra proferentum, and relying on United States v. Seckinger, 397 US 203 (1970), the ALJ did construe the ambiguities in the contracts against the government and in favor of petitioner.

DOL excepted to the decision of the ALJ, which was subject to review by the Administrator. 29 CFR §6.14. On February 26, 1979, the Administrator rendered his decision whereby each exception taken by DOL was approved and adopted verbatim (except as to the recommendation that petitioner be declared an ineligible bidder) and the Decision and Order of Judge Schneider was set aside and the case remanded for computation of amounts due to plaintiff's employees. That was accomplished, and on November 14, 1979, Judge Schneider rendered his Decision and Order on Remand and determined that, based on the mehtod of computations directed by the Administrator, $36,646.09 was due and owing from the petitioner to certain employees.

The Decision of the Administrator of February 26, 1979 followed by the Decision

and Order on Remand of the ALJ of November 14, 1979 were the final steps of the administrative process, and on January 15, 1980, the Chief ALJ forwarded the requisite recommendation that plaintiff not be subject to the ineligibility provisions of 41 USC §354(a), which recommendation was followed by the Secretary.

Petitioner then filed this action in the United States District Court for the Northern District of Calfornia on January 28, 1980, contending that the action of the Administrator was arbitrary, capricious, an abuse of decretion, and contrary to law, in excess of jurisdiction, without observance of procedure required by law, and unsupported by substantial evidence, thus petitioner sought relief in the form of reinstatement of the Decision and Order of the ALJ, and the return of the money withheld by GSA.

Cross-motions for summary judgment were filed in the district court, and the court ruled from the bench, granting the government's motion and denying petitioner's. Summary judgment was entered February 11, 1982. Saavedra appealed.

On appeal, the Court of Appeals for the Ninth Circuit noted the "government's obfuscatory practices in these contracts." Nevertheless, the court held that the unpublished policy letter could be relied on by DOL, that the contra proferentem rule did not apply because petitioner had not relied on the ambiguity, and thus the Administrator's (and therefore the Secretary's) decision was not arbitrary or capricious. The judgment of the district court was affirmed on February 4, 1983. In a petition for rehearing, Saavedra argued that the court overlooked the fact that the record showed he relied on the

the ambiguous language of the contract and acted in accordance with his reliance. The petition was denied on April 15, 1983.

The present petition for certiorari seeks review of the decision of the court of appeals on the ground that the decision below departed from applicable decisions of this Court and other courts of appeal in permitting the unpublished letter of the DOL to bind petitioner to his detriment (and for that matter, in permitting the Administrator to rely on unpublished opinions in reaching his decision) and in refusing to apply the rule of contra proferentem in construing the ambiguous contracts at issue. Finally, the petition asks the Court to rule on the effect a regulation incorporating the "clearly erroneous" standard in the administrative review process has on the standards of judicial review.

C. STATEMENT OF RELEVANT FACTS

Petitioner's first experience with doing business with the government was in 1975 when he bid on and was awarded contract 38. The facts as found by the ALJ as to the circumstance surrounding petitioner's entry into these contracts and as to the content and nature of the contractual provisions are as cogent and concise a statement of facts as can be set forth. Because one of the issues is whether the "clearly erroneous" standard of the regualtions was properly applied, the findings of the ALJ are quoted at length where appropriate in this factual narrative.4/

(1) Contract 38

The ALJ found:

4/ Footnotes to the quoted portions of the findings are not from the ALJ's decision and order.

"The Solicitation, Offer, and Award for Contract 38 was prepared in part on Standard Form 33, (Nov. 1969). The Solicitation was issued on or about April 28, 1975, and the offer was signed by [petitioner]5/ on or about June 3, 1975. The award indicated it was signed for the United States by Hugh McLuskie on June 20, 1975. The original contract was introduced as Secretary's Exhibit #1, and contains several flaws. Although page 1 indicates it is one of 20 pages, in fact there are 27 pages since GSA Form 2166 (2 pages) and GSA Form 2952 (5 pages) are attached. The amount of award is written as $95,000,000 although it was obviously intended to be $95,000.00. Page 3 and 4, entitled "Solicitation Instructions and Conditions" are poorly reproduced so as to be difficult to read in part. The rest of page 6 is legible but confusing. It sets forth the wages and fringe benefits that would be paid truck drivers, helpers, and packers if they were paid by the federal government under 5 USC §5341. This is confusing because these wages have nothing to do with wages under the contract. They are set forth merely as illustrations of what one employer (the U.S.) would pay for presumably similar work. A government witness testified that bidders often have

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5/ The ALJ opinion of course refers to Petitioner herein as "Respondent" (see Appendix C).

questions about this page. In fact, testimony before the House subcommittee considering the Act prior to its passage warned that these figures would be confusing. Schlemon, 'The Service Contract Act - A Critical Review,' 34 Fed. Bar J. 240, 247 (1975).

[Petitioner] testified that it is these figures on page 6 that he used in preparing his bid, and I credit this testimony because he had no conferences with any government official prior to submitting his bid on contract 38. --- Page 18 is the wage determination (No. 66-190 (Rev. 9) Dated: August 30, 197__ [last digit illegible]) which the government contends is applicable here. In addition to being poorly reproduced so that some words are difficult to read, it contains at least two substantive errors on its face. (1) It specifies the same minimum hourly wage ($7.19) for a helper as for a foreman, and (2) Numbers which obviously refer to footnotes under columns for Minimum Hourly Wage, Health and Welfare, Vacation, Holiday, and Pension go from 1 to 5, but the footnotes only go from 1 to 4. It appears from the evidence that it was intended that each of the numbers from 1 to 4 should have been moved to the right one column, and that the number 5 should have been omitted.

Furthermore, the first figure of the text as footnote (1), (which should have referred to Health and Welfare but literally referred to Minimum Hourly Wage) was so unclearly written that although the government contends that it was "$88.35" a government witness admitted it might be read as

"$33.35", and the compliance officer pencilled in "88.35" on his copy of the contract to make it more legible.

Pages 19 and 20 of the contract are out of order (page 20 preceded page 19 in the collated document) and are wage determination 66-491 (Rev. 8). The inclusion of this wage determination is confusing for the same reason that page 6 is confusing, i.e., that it refers to wages for Marin County which have no relevance to the work bid for by [petitioner] which is for San Francisco County only. Even a government witness was confused by this. See Tr. 15:21-16:10.---.

---Although there was conflicting testimony, the following is the most credible account of pre-award negotiations:

In the week prior to June 20, 1975, Mr. Orange, who at the time assisted the contracting officer, Mr. McLuskie, and [petitioner] had a meeting. Fringe benefits were not discussed at this meeting. However, since [petitioner's] bid seemed low, Mr. Orange called [petitioner's] attention to the minimum hourly wage set forth on page 18. In fact, except for two relatively insignificant instances, [petitioner] paid those wages. [Petitioner] had calculated his bid on the much lower wages shown on page 6 of the contract. Shortly after this meeting, and prior to receiving written notice of the award of the contract, [petitioner] called the contracting officer, Mr. McLuskie, in an attempt to withdraw his bid. [Petitioner] testified that his reason for attempting to withdraw was other work and not his miscalculation on his bid, but the inference seems reasonable

that the miscalculation was nevertheless a contributing reason. In any event, Mr. McLuskie threatened [petitioner] with 'something like if I didn't perform or he will see that I will get - - he will get me broke to the point where I won't have a place to sleep.' Tr. 186:15-18.

The bid was not withdrawn and the written award is dated June 20, 1975.

There were two subsequent changes to contract 38. The first, dated October 24, 1975 changed page 18, the allegedly applicable wage determination, to reflect that foremen should get paid more than helpers. The second, dated March 26, 1976, made some changes not relevant here.

Mr. Lawrenz, a Department of Labor compliance officer started investigating [petitioner's] compliance with contract 38 in May, 1976. By May 27, 1976, the date when [petitioner] submitted his offer on contract 67, the government was withholding $9,000.00 from [petitioner] on contract 38. In order to stay on the list of firms to which solicitations are sent decided to bid on contract 67. His bid was substantially higher than his previous bid, and he did not expect to get the award. He was not specifically informed of violations on contract 38 until June 11, 1976, about two weeks after submitting his bid on contract 67. The award was signed for the United States on June 14, 1976."

Appendix C, pp. 3-10

(2) Contract 67

The ALJ found the wage determination

of contract 67 legible and unambiguous with respect to the amount of health and welfare benefits to be awarded and with respect to eligibility, though it did contain the same ambiguities as to holiday and pension benefits as under contract 38 and those infirmities will be set forth hereafter.

(3) Eligibility for health and welfare benefits.

The compliance officer of DOL used a standard to determine eligibility for and computation of health and welfare benefits under contract 38 not articulated in the contract or in any regulation. He relied on an unpublished "sanitized" letter of an Assistant Administrator introduced into evidence as Exhibit 11. The ALJ rejected such action as arbitrary and the Administrator, adopting the DOL Solicitor's views verbatim, reversed, holding that the unpublished letter was binding and somehow the contractor

was "on notice" of such opinion (Appendix C-1, pp. 8-13).

The facts, as found by the ALJ were as follows:

> "The compliance officer computed the amount underpaid for Health Welfare on the assumption that the wage determination required a contribution by the employer of $88.35 per month for each employee who had completed 80 hours of work straight time for the employer in the previous calendar month, including both commercial work and work under the contract. He pro-rated the amount of contribution due for employees who worked less than 80 hours in any month on contract work by multiplying $88.35 by a fraction, the numerator of which is the number of hours worked on contract work that month and the denominator of which is 80.6/
>
> * * *
>
> The wage determination requires payments for each emmployee who has completed 80 hours straight time employment in the previous calendar month. It does not specify whether the 80 hours is to include both contract work and commercial work,

---

6/ The ALJ pointed out that, as noted earlier, the amount could be read as either $88.35 or $38.35 and, relying on United States v. Seckinger, 397 US 203, 210, 216(1970), he resolved the ambiguity against the drafter, the government and concluded the computations should be based on $38.35. (Appendix C p.16).

as assumed by the compliance officer, or contract work only, as urged by [petitioner]. To take one example, Danny Exon (Secretary's Exhibit 10, pages A-7, et seq.) worked more than 80 hours all together in each of the seven months from October 1, 1975 through April, 1976. However he worked more than 80 hours on contract work in only two of those months, December and April. [Petitioner] urges that this employee is entitled to Health and Welfare benefits only in the two months following December and April. If the contract itself specified clearly which hours count as qualifying, there would be no problem.--- If there were a published regulation specifying the same matter the parties would be bound by it.

However, contract 38 does not specify and there is no published regulation. Instead the Solicitor relies on a copy of a letter, dated July 10, 1970, from the then Assistant Administrator to an attorney whose name had been deleted. (Secretary's Exhibit 11.) [R. 941]. The letter appears to deal with the instant question as it arose in a specific case under a prior, presumably similar, wage determination. It clearly supports the compliance officer's approach, urged here by the Solicitor. It may be evidence of an administrative practice, but it cannot be binding on a private citizen. City of New York v. Diamond, (SDNY 1974) 379 F. Supp. 503, 516, 518."

Appendix C, pp. 15-18.

The ALJ concluded that Petitioner was not required to pay health and welfare benefits for any employee who worked less than 80 hours on contract work during the previous month. Id., p. 20.

(4) Eligibility for holiday and pension benefits

The evidence as to holidays and pension benefits under both contracts 38 and 67, as found by the ALJ was as follows:

> "The wage determination (Secretary's Exhibit 1, p. 18) specifies that there are 11 paid holidays per year provided the employee has been employed by the employer for at lease 13 days in the month in which the holiday occurs. The same question arises here as in the Health and Welfare area, to wit, does '13 days' refer to both contract and commercial work for the employer or does it refer to contract work only? Nor is there anything to suggest whether full days or partial days are meant. In the absence of clear contractual language or governing regulation, [petitioner] is entitled to have such latent ambiguities resolved in his favor. Accordingly, I conclude that [petitioner] was required to pay holiday pay only for those employees who worked 104 hours

or more (8X13) on contract work in the month in which the holiday occurs. With this interpretation of the wage determination language it becomes unnecessary to apportion the amount paid for holiday pay. If the employee qualifies for the benefit in any month, he is entitled to one full day's pay at the straight time contract rate for eight hours for any holiday on which he works.

* * *

The wage determination specified that pension benefits payments are $3.70 a day for each employee who has worked at least four hours in that day. The same ambiguity exists here as with Health and Welfare and Holiday benefits, i.e., does the 'four hours' refer to four hours of work done on both commercial and contract work together, or does it refer only to work under the contract. Again, absent clear contract language or specific regulation, [petitioner] is entitled to have such ambiguity resolved in his favor. Accordingly, I conclude that [petitioner] was required to make a $3.70 payment only to such employees as worked more than four hours in any day on contract work. This precludes the necessity of further apportioning the amount of contribution."

Appendix C, pp. 26-28.

The Administrator found that though the unpublished 1970 letter does not refer

to these fringe benefits, it should be applied.

Appendix C-1, pp. 13-15.

(5) Unpublished and unindexed opinions

In reaching his decision, the ALJ declined to follow decisions of other ALJ's and the Administrator cited and relied on by DOL, because:

> "The cited decisions are available to the public only by name and number and are not indexed by subject matter. It is therefore impossible, from a practical standpoint, for an attorney to find decisions that may be favorable to his client. (This statement is based on an affidavit by [petitioner's] counsel which has not been controverted).
>
> The very able atorneys in the Solicitor's office may be expected to be familiar with these decisions because of their thorough knowledge of the proceedings that result in these decisions. It would give the Solicitor an unfair advantage, in an adversary setting such as this, to rely on data which only he has the means of retrieving."

Appendix C, pp. 36-37.

The Administrator reversed this

finding, quoting the unsworn statement of the DOL Solicitor that such decisions were published in various reporter services. Appendix C-1, pp. 16-17. Counsel for petitioner had filed an additional declaration under penalty of perjury with the Administrator establishing that no meaningful publication or indexing existed, but the Administrator simply accepted the unsworn conclusion of the Solicitor without critical analysis.

(6) Ineligibility under 41 USC §354(a)

The ALJ recommended that [petitioner] be relieved from being placed on the ineligible bidders list as provided in 41 USC §354(a) for the following reasons:

> "I find that the following are unusual circumstances, upon which I rely as reasons for the recommendation: contract 38 was the first contract [petitioner] ever had with the federal government and contract 67 the second. When [petitioner] tried to withdraw his bid, he was threatened with action that would

cause his bankruptcy. By the time of his bid on contract 67 he had not yet been specifically told of contract violations, but felt duress because the government was withholding $9,000.00. He was afraid that he would not get any further government contracts if he did not submit a bid. When specific violations were called to his attention, and he had assistance of counsel an agreement was reached for withholding sufficient amounts to insure that employees would be paid all amounts found due, in accordance with 41 USC §352(a). Respondent at the hearing evidenced the fact that he does not speak English perfectly. He usually has only five or six employees and is, like many people, reluctant to seek an attorney's advice until after problems have been called to his attention. Furthermore, contract 38 was confusing and sloppy. Contract 67 was less sloppy but still contained the ambiguities discussed above."

Appendix C, pp. 37-38

5. REASONS FOR GRANTING THE WRIT

The decision of the court of appeals applying the general rules of judicial review under 5 USC §706 rendered the restraints imposed by 29 CFR §6.14 meaningless. Since 29 CFR §6.14 permits the

Administrator to set aside the findings of the ALJ only if clearly erroneous, the focus of inquiry should be whether there was evidence before the ALJ to support his findings. Though lower courts have addressed the issue with different results, this Court has not determined the effect of such a binding regulation on judicial review.

Moreover, the decision of the court of appeals not to apply the rule of contra proferentem was contrary to decisional law among the courts of appeal and this Court.

Finally, though the determination of eligibility for benefits was based on an unpublished letter opinion of a DOL official, the court of appeals declined to enforce the requirements of publication as set forth in 5 USC §552 (and §553) and held that eligibility for benefits

could be based on commercial as well as government contract work, though the SCA and the regulatory scheme implementing the Act made it clear that benefits were to be paid only to employees working on government contracts. The court's decision was a departure from accepted principles of decisional and statutory administrative law.

All of these issues present important questions of federal law governing the relationship of federal agencies with private citizens with whom they do business, which have not been, but should be, settled by this Court.

A. THE FOCUS OF JUDICIAL REVIEW SHOULD HAVE BEEN TO INQUIRE WHETHER THE FINDINGS OF THE ALJ WERE CLEARLY ERRONEOUS

The court of appeals found that:

> "The Secretary's decision was not arbitrary nor capricious, was in accordance with law, and was supported by substantial evidence. Most of his

> reversals of the ALJ were on legal issues. His conclusions on these conformed to the Act's purpose and to departmental policy, published and unpublished. Reversals of factual findings were limited to those he reasonably considered clearly erroneous."

Appendix A, p. 18.

But, though the court noted that there was a special standard governing SCA proceedings, i.e. 29 CFR §6.14 (Appendix A, pp. 6-7), it nevertheless held that:

> "The decision for court review is that of the agency, here the administrator's decision adopted by the Secretary. The court does not review the ALJ's decision, which is merely part of the record."

Appendix C, p. 5.

Under the usual standards governing judicial review of agency action, it is true that a decision of an ALJ is but one step in the administrative process; and disparity between a decision by an ALJ and final agency action does not serve to modify the "substantial evidence"

standard, though such contrary findings might lead a court to conclude that the evidence upon which the final decision was based was less substantial. Universal Camera Corp. v. Labor Bd., 340 US 474, 496 (1951).

But in this case, at least with respect to findings of fact, the decision of the ALJ is not but one more factor in the determination of whether the evidence supporting the Administrator's decision was substantial. Compare id., pp. 496-497. Here there was a regulation binding on the agency which provided that,

> "With respect to the findings of fact, the Administrator shall modify or set aside only those findings that are clearly erroneous."

29 CFR §6.14.

Indeed, even in the absence of such a regulation, some courts have held that findings of a hearing examiner (now ALJ)

are conclusive if supported by a preponderance of the evidence and his findings can only be overruled if "clearly incorrect." United States v. Powers Building Maintenance, 336 F. Supp. 819, 822 (W.D. Okla. 1972); United States v. Southland Manufacturing Corporation, 264 F. Supp. 174, 177 (P.R. 1967).

Though the "clearly erroneous" rule may not be a constitutional requirment in administrative proceedings, the same standard applicable to appellate courts in reviewing decisions of trial courts under the "clearly erroneous" rule must be applicable to administrative appeals where such standard is adopted by regulation. Compare National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484, 490 (2d. Cir. 1952); and see Masters v. Maryland Management Company, 493 F. 2d 1329, 1333 (4th Cir. 1974).

This Court has stated that,

> "'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'"

United States v. Oregon State Medical Soc., 343 U.S. 326, 339 (1952), citing and quoting from United States v. U.S. Gypsum, 333 U.S. 364, 395 (1948); and see White Glove Building Maintenance, inc. v. Brennan, 518 F. 2d 1271 (9th Cir. 1975).

If the evidence can be viewed as supporting either of two conclusions, if the trier of fact decides one way, such a decision cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

It is the responsibility of the ALJ to evaluate the credibility of witnesses and to determine the weight to be given their testimony, NLRB v. Anthony Co., 557 F. 2d 692, 695 (9th Cir. 1977); and,

it is the decision of the ALJ which must be examined to see if it is supported by evidence and if so it must be affirmed as provided in 29 CFR § 6.14; NLRB v. Dinion Coil Co., supra. Even if the Administrator (or the court) disagrees with the findings made by the ALJ, the case cannot be decided differently unless the ALJ was clearly erroneous. White Glove Building Maintenance, Inc. v. Brennan, supra.

In this case, the ALJ made a number of findings of fact which the Administrator set aside and replaced with his own findings. Thus, the ALJ determined that petitioner justifiably relied on the wages set forth at page 6 of the Solicitation in preparing his bid and that though the actual wages to be paid were explained to petitioner, fringe benefits were never discussed. The Administrator ignored petitioner's reliance and said there was

no reliance or any ambiguities in the contract

The ALJ further found as a fact after an examination of the wage determination that the amount of health benefits was illegible and could be read as $88.35 or $38.35. The Administrator disagreed, based on an analysis of the transcript. But it was clear that the ALJ based his finding on an examination of the document itself. He stated at the hearing, that the document,

> ". . . speaks for itself. I will decide how readable it is."

The document was in evidence and the ALJ's finding was supported by other evidence, both testamentary and documentary. Such finding must be affirmed since the Judge's appraisal of documentary evidence must be given as much weight as his rulings on credibility. United States v. Alaska Steamship Company, 491

F. 2d 1147 (9th Cir. 1974).

Finally, the ALJ determined, based on evidence presented to him that certain administrative decisions were not generally available to the public and were not indexed by subject, thus precluding counsel as a practical matter from finding favorable cases. The latter finding was based on an uncontroverted declaration of counsel which showed that said decisions are unpublished and generally unavailable. The Administrator adopted the unsworn conclusory allegations of the DOL Solicitor that such decisions were available, despite the repeated sworn statements of Petitioner's counsel. Such blatant disregard of the facts established before the ALJ, were accorded deference by the court of appeals, which apparently approved the Administrator's finding. Appendix A, p.10.

Under 29 CFR § 6.14, the Administrator

should not have set aside the ALJ's findings on these three crucial issues. As we shall see in the following argument, the Administrator's conclusion that petitioner did not rely on ambiguities in the contract was the lynchpin in the agency decision reversing the ALJ and the decisions of the courts below affirming that decision. But the ALJ's decision that petitioner did justifiably rely on the ambiguity was supported by evidence, including the testimony and personal character and background of petitioner: credibility, if it please the Court.

The Administrator, adopting the DOL Solicitor's arguments, concluded that the ALJ should have requested other evidence not presented at the hearing (an otherwise irrelevant wage determination) to determine whether the wage determination in

question was actually $88.35 or $38.35.7/

But it was not up to the ALJ to introduce evidence; rather it was up to the adverse parties to present that relevant evidence each deemed appropriate. Decisions of a trial judge must be based on the evidence introduced before him. United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946); Department of Pub. Serv. Reg., Etc., Mont. v. United States, 344 F. Supp. 1387, 1388 (Mont. 1972). Agency action must be sustained by the record. Midwest Maintenance & Const. Co. v. Vela, 621 F. 2d 1046, 1050-1051 (10th Cir. 1980).

Just as it is the record before the trial judge which must form the basis of the reviewing court's judgment on appeal, United States v. Pierce Auto Freight Lines,

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7/ Not unlike the Administrator's decision to ignore the evidence presented to the ALJ on the issue of availability of other agency opinions.

supra; Department of Pub. Serv. Reg., Etc. Mont. v. United States, supra, so, under 29 CFR § 6.14, the court of appeals should have examined the record before the ALJ to determine if the evidence supported his decision. Only in the absence of such evidence could the ALJ's findings be considered clearly erroneous. White Glove Maintenance, Inc. v. Brennan, supra; compare United States v. Yellow Cab Co., supra. Here the evidence not only supported the ALJ's findings of fact, there simply was no other credible evidence supporting any contrary determination.

> "'Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth.*** How can we say the Judge is wrong? We never saw the witnesses.*** To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.'"

United States v. Oregon State Medical Soc., supra, 339.

The determination by the court of appeals not to review the ALJ's decision, prevented it from making the determination required by law, i.e. whether the findings of the ALJ were clearly erroneous. This Court should take this opportunity to clearly articulate the proper scope of judicial review when courts are faced with the interposition of a"clearly erroneous" standard within the agency proceedings.

B. THE CONTRACTS WERE AMBIGUOUS AND SHOULD HAVE BEEN CONSTRUED AGAINST THE MAKER, THE GOVERNMENT

The Administrator, adopting the DOL Solicitor's views, decided that the rule of contra proferentem, applied by the ALJ, was inapposite because petitioner did not rely on the ambiguity.

It is true petitioner was not aware of the meaning of the wage determination or the necessity to pay fringe benefits when he bid on the contract; nor was he ever

made aware of the fringe benefits after he bid. But petitioner clearly "relied" on and was misled by the ambiguities in the contract, particularly the wage rates set forth at page 6.8/ The juxtaposition of footnotes in the wage determination, the inclusion of a Marin County determination, and the presence of the wage rates at page 6, obviously misled and confused petitioner. It is conceded he was unaware of his full obligation. But it is a quantum leap from there to where the administrator and court of appeals arrived.

The administrator and court of appeals cited Dale Ingram, Inc. v. United States, 475 F. 2d 1175, 1185 (Ct. Cl. 1973), to support the conclusion that a contractor

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8/ In fact, petitoner actually paid his employees more than he was required to under the schedule set forth at page 6 plus fringe benefits, once he was apprised of the fact that higher wages must be paid, $7.165 per hour, as compared to $6.20 per hour plus fringe benefits of 9% for a total of $6.78 per hour due under the schedule at page 6 of contract 38.

must show reliance on an ambiguity in a contract before the contra proferentem rule applied. But the decision in Dale Ingram was only the then latest of a line of authority exemplified by cases such as Brezina Construction Company v. United States, 449 F. 2d 372 (Ct. Cl 1971) and WPC Enterprises, Incorporated v. United States, 323 F. 2d 874 (Ct. Cl. 1963), both cited by the court in Dale Ingram. In Brezina, citing WPC Enterprises, the court held that,

> "The rule, often repeated by this Court, is that if a Government contract is ambiguous and if the construction placed upon it by the contractor is reasonable, the contractor's construction will be adopted, unless the parties' intention is otherwise revealed."

449 F. 2d at 375.

Moreover, the court pointed out that only where there is a "patent and glaring" ambiguity is there a duty to seek clarification. The court stated:

> "Here, we have already determined that plaintiff's construction of the contract was reasonable, and there is no assertion that plaintiff acted in other than good faith. Certainly we think that these circumstances are relevant to the inquiry as to the patency and glaringness of the contractual discrepancy, because saying that a contractual provision contains a patent discrepancy is tantamount to saying that no reasonable construction of the provision can be made unilaterally by the contractor until the discrepeancy is resolved by the parties."

Ibid.

In this case, there is no question that petitioner acted reasonable in concluding that his wage responsibility was governed by the wages at page 6 of the contract. Moreover, when the contracting officer told him he had to pay more wages, he reasonable could assume that that officer would have told him of any other responsibilities he had. Since petitioner's interpretation of the contract was reasonable, the contra proferentem rule applies

and all ambiguous language of the contract should be construed against the maker, here the United States. H & M Moving, Inc. v. United States, 499 F.2d 660, 671, 673 (Ct. Cl 1974).

The court of appeals apparently accepted the Administrator's finding that petitioner did not rely on his interpretation of the contract; but it is clear that petitioner not only reasonably relied on his interpretation but acted upon it and then acted in compliance with what he understood to be the contracting officer's clarification of the wage scales to be applied.

The court of appeals noted the government's "obfuscatory practices in these contracts" but nevertheless held petitioner responsible, though the record shows that he acted in good faith and in compliance with what he reasonably believed

to be the contractual obligations he had assumed.

In United States v. Seckinger, 397 US 203, 210, 212, 216 (1970), this Court held that a contract must be construed most strongly against the maker, particularly when the drafting party is the government, with its strong bargaining position. The Court then interpreted the clause in question (an indemnity agreement) in a manner neither party had prior to entering the contract. See 397 US at 215.

Here, GSA knew petitioner interpreted the contract in a manner which conflicted with the wage determination, yet did nothing to ensure that petitioner be made aware of his obligations; thus, the contract must be interpreted in favor of petitioner and all ambiguities must be resolved against the drafter of the contract.

United States, etc. v. Haas & Haynie Corp., 577 Fed. 568, 573, 574 (9th Cir. 1978).

A government contractor cannot be expected to exercise clairvoyance. Corbetta Construction Company v. United States, 461 Fed. 1330, 1336 (Ct Cl 1972). He cannot be charged with knowledge of that which the government made obscure.

As the court of appeals for the fifth circuit observed in Diamond Roofing v. Occupational S. & H. Rev. Com'n., 528 F. 2d 645, 649 (5th Cir. 1976):

> "An employer. . .is entitled to fair notice in dealing with his government."

"Fair notice" does not contemplate after the fact advice of obligations. WPC Enterprises, Incorporated v. United States, supra, 879.

The decision of the court of appeals denying petitioner the benefit of the rule of contra proferentem was contrary

to decisional law of this Court and courts of appeals as noted above and this Court should now, 13 years after its decision in Seckinger, decide this case and clearly establish the standards of fairness which should be applied to contractors dealing with their government.

C. THE USE OF AN UNPUBLISHED LETTER OPINION OF AN OFFICIAL OF THE DOL TO DETERMINE PETITIONER'S OBLIGATIONS WAS CONTRARY TO LAW AND THE METHOD USED WAS OTHERWISE UNAUTHORIZED AND ARBITRARY

The DOL enforcement officer, Lawrenz, relied on an unpublished, "sanitized" letter opinion of an assistant administrator to determine that eligibility for benefits should be based on both government contract and private commercial work. The ALJ rejected the use of such letter as authority for the determinations and found, as petitioner argued, that the statutory and regulatory scheme did not support the

enforcement officers actions.

He found as follows:

> "The scheme of the Act as a whole supports [petiitoner's] contention. Thus, the Act requires that minimum wages be paid 'in the performance of the contract,' not to all employees of the contractor. 41 U.S.C. § 351(a)(2). 'Service employee' is defined as 'any person engaged in the performance of a contract...' 41 U.S.C. § 357(b) (emphasis added). 29 C.F.R. § 4.146 states that the contractor 'is required to comply with the provisions of the Act and regulations thereunder only while his employees are performing on the contract....'
>
> The Solicitor suggests an analogy to 29 C.F.R. § 4.171(b)(2), which refers to vacation benefits. Vacations, which are based on years of service with an employer may well be subject to different considerations than Health and Welfare benefits which are based on hours worked. Rather than supporting the Solicitor, the regulation shows that a regulation could easily be written that would support him. See Diamond Roofing v. Occupational S. & H. Rev. Com'n, (5 Cir. 1976) 528 F. 2d 645, 648-649.
>
> These considerations lead me to conclude that [Petitioner] was not required to pay Health and Welfare benefits for any employee who worked less than 80 hours on contract work during the previous month."

Appendix C, pp. 18-20.

The same considerations led the ALJ to reject similar determinations of eligibility for holiday and pension benefits. Id., pp. 26-28, 34-35.

the Administrator, of course, rejected the ALJ's conclusions and the court of appeals determined not only that the lack of publication was not fatal, but also that the procedures in the letter paralleled DOL's methods in determining eligibility for vacation benefits under 29 CFR § 4.171, thus were not arbitrary. Appendix A, pp. 12-13.9/

9/ The court of appeals suggested that computation of the amount of benefits by using a ratio of contract work compared to total work would be inequitable. The issue is not raised in this petition, since before reaching the question of the amount of benefits eligibility must be determined. If 80 hours of contract work is required for eligibility then it may be that a full benefit should be paid to such employees; but if 80 hours of combined work is only required, then the method of computation suggested by Petitioner would be far more equitable.

The court of appeals ignored the command of 5 USC § 552 which clearly requires publication and indexing of opinions, rules and regulations before a party may be adversely affected by the same.10/ See also 5 USC § 553. The failure to publish the letter opinion here is fatal. In Re Pacific Far East Line, Inc. 314 F. Supp. 1339, 1348 (N.D. Ca.. 1970) aff. 472 F. 2d 1382 (9th Cir. 1973). Such unpublished procedures cannot stand against a person adversely affected thereby. Northern California Power Agency v. Morton, 396 F. Supp. 1187, 1191 (D.C. 1975), aff 539 F. 2d 243 (D.C. Cir. 1976); see also Hartnett v. Cleland, 434 F. Supp. 18, 21, n.7 (S.C. 1977). The procedures set

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10/ The same may be said as to the unpublished and unindexed opinions of ALJ's and Administrtors which the ALJ refused to consider, but which the Administrator and court of appeals agreed were appropriate administrative authorities. See USC § 552 (a)(2)(A)(i)(ii).

forth in the letter opinion relied on by DOL are absolutely void. City of New York v. Diamond, 379 F. Supp. 503, 516 (S.D.N.Y. 1975).

Nor was the court of appeals correct in its determination that since the opinion was consistant with agency practice with regard to vacation pay that the practice followed was one to which deference must be given.

The ALJ noted that different considerations obviously could motivate the Secretary in establishing eligibility for vacation pay rather than other fringe benefits. The court of appeals had no legal basis in relying on the existence of 29 CFR § 171 (b)(2) to establish the validity of the procedures employed by the DOL in determining eligibility for other short term benefits. The existence of 29 CFR § 171(b)(2) merely makes it clear that

the Secretary knew how to issue regulations establishing the procedures and criteria to employ in calculationg fringe benefits. Part 4 of Title 29 CFR is an extremely detailed compendium of methodology and policies concerning computation of wages and fringe benefits under the Act. Where deviation was thought to be necessary from the statutory and regulatory policy of rewarding employees only for work performed under the contract the Secretary clearly stated that intent, e.g. 29 CFR §4.171(b)(2). One cannot then assume or imply that the Secretary meant that a similar approach, unarticulated in the regulations, should be taken with respect to other types of benefits. See Diamond Roofing v. Occupational S. & H. Rev. Com'n, supra., 648. As the Court observed in Diamond Roofing, if a regulation misses the mark, there is no need to press

its limits by judicial contruction since the matter is easily remedied by amendment; moreover, only the Secretary has the power to promulgate regulations, not the courts or administrators, and a regulation cannot be construed to mean what was intended but not adequately expressed. 528 F. 2d at 648-649. See also Montgomery Ward & Co., Inc. v. F.T.C., 691 Fed. 1322, 1332 (9th Cir. 1982).

The entire regulatory and statutory scheme makes it clear that only work under government contracts gives rise to benefits under SCA. In addition to 41 USC §§ 351(a)(1), 351(a)(2), 357(b) and 29 CFR §4.146 cited by the ALJ in the portions of his decision quoted in this section, see also 29 CFR §§ 4.150, 4.151, 4.152, 4.165(a)(2), 4.170(a), and 4.173 included in Appendix E for other examples of regulations clearly providing benefits only for work done

under government contracts. Contrary to the conclusions of the court of appeals and the Administrator, the entire statutory and regulatory scheme rewards work done under government contracts not general commercial work.

There is no doubt that the 1970 letter opinion relied on by the Department of Labor, whether viewed as an interpretive ruling or otherwise was used in a was to affect the substantive rights of persons, such as petitioner outside the Department of Labor, and thus was required to be published. Anderson v. Butz, 550 F. 2d 459, 462-463 (9th Cir. 1977); Percy v. Brennan, 384 F. Supp. 800, 813 (S.D.N.Y. 1974); Piercy v. Tarr, 343 F. Supp. 1120, 1128 (N.D. Cal. 1972). In the absence of such publication it was void. Anderson v. Butz, supra; Saint Francis

Hospital v. Weinberger, 413 F. Supp. 323, 327 (N.D. Cal. 1976).11/

The interpretation given the regulation by the enforcement officer and the Administrator is without any legal or rational basis and need not be given any deference whatsoever. Harris v. Levi, 416 F. Supp. 208, 210 (D.C. 1976), affirmed in part and modified in part sub nom. Harris v. Bell, 562 F. 2d 772 (D.C. Cir. 1977).

Giving deference to an agency's interpretation of its rules is not an absolute requirement and particularly where the interpretation involves giving meaning to regulatory language, there is

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11/ It may also be noted that in contract 67, the Secretary sought to correct the latent ambiguity which existed in the prior wage determination with respect to use of non-contract time in determining whether the 80 hour qualification had been met. Such an admission of prior ambiguity, H. & M. Moving, Inc. v. United States, supra, 667, 671, calls for invocation of the rule of construction established in United States v. Seckinger, supra, i.e. the contract must be construed against the drafter. 397 U.S. at 210.

little reason to defer to the agency's interpretation. Montana Power Co. v. Environmental Protection Agency, 429 F. Supp. 683 (Mont. 1977); see also Southern Packaging and Storage Co. v. U. S., 458 F. Supp. 726, 731-734 (So. Car. 1978).

Indeed, a reviewing court is not only not bound by an agency's interpretation of its own rules, but must overturn an interpretation which is inconsistant with its published regulations. Tenneco Oil Co. v. Federal Energy Administration, 613 F 2d 298, 302 (Em. App. 1979).

In this case the statutory and regulatory scheme dictates that no fringe benefits will be paid except for work performed under government contracts. Petitioner cannot be charged with the obligation to pay fringe benefits based on commercial non-contract work, without at least a specific contractual requirement

to do so. The unique system of calculating eligibility devised by the Assistant Administrator in 1970 and followed in this case must fail as not being based on either contract, law, or reason, and as against Congressional and Administrative policy as set forth in SCA and the regulations promulgated under its authority. Compare United States v. Larionoff, 431 US 864, 873 (1977).

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its descretion.'"

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

This Court must adjudicate this case to bring it within the statutory commands of 5 USC §§ 552, 553 and decisional law.

6. CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 14, 1983

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94102

Counsel of Record for
Petitioner
GUILLERMO A. SAAVEDRA,
individually and doing
business as SAAGAN MOVING
& STORAGE COMPANY

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GUILLERMO A. SAAVEDRA,
individually and doing business
as SAAGAN MOVING & STORAGE COMPANY,

Petitioner,

v.

RAYMOND J. DONOVAN, Secretary
of Labor,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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& Storage Company

INDEX TO APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
(February 4, 1983)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GUILLERMO A. SAAVEDRA, individually and doing business as SAGAAN MOVING & STORAGE COMPANY,	)	FILED FEB 4 1983 PHILLIP B. WINBERRY CLERK, U.S. COURT OF APPEALS
Plaintiff-Appellant,	)	
vs.	)	No. 82-4130
RAYMOND DONOVAN, Secretary of Labor, et al.,	)	DC# C-80-591-RHS
Defendants-Appellees.	)	OPINION

Appeal from the United States District Court for the Northern District of California District Judge Robert H. Schnacke, Presiding

[Argued and Submitted January 10, 1982]

Before: DUNIWAY, WRIGHT, and CHOY, Circuit Judges:

WRIGHT, Circuit Judge:

The Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (the Act), mandates minimum wages and fringe benefits for

employees engaged in government contract work. Its purpose is to protect employees of government contractors. Before the Act, the federal government had been "subsidizing" substandard levels of compensation by awarding contracts to those who were able to bid low by paying less. American Federation of Government Employees, Local 1668 v. Dunn, 561 F. 2d 1310, 1312 (9th Cir. 1977).

The Act requires the Secretary of Labor (Secretary) to determine wages and benefits by job category and geographic area ("wage determinations"). Contracts subject to the Act must incorporate the appropriate wage determinations. 41 U.S.C. § 351(a), (b).

Plaintiff-appellant Saavedra, dba Saagan Moving and Storage Co., was awarded two government contracts which were subject to the Act. He is not

proficient in English and did not fully understand the contracts or even read them thoroughly. He based his bid for the first contract on an irrelevant set of figures occurring early in that document. Being unaware that he had to provide fringe benefits, he failed to do so.

The Department of Labor brought an enforcement proceeding. The Administrative Law Judge (ALJ) concluded that Saavedra was bound by and had violated the wage determination and must recompense the affected employees. But he thought the contracts confusing, sloppy, and rife with mistakes. Provisions that he thought ambiguous as to computation of amounts due he interpreted in Saavedra's favor.

Both parties excepted to the ALJ's decision, which triggered recon-

sideration by an administrator. He set aside the ALJ's resolutions of ambiguities in Saavedra's favor and chose the Department's methods of computation. The Secretary adopted the administrator's decision.

Saavedra challenged the final decision in district court where summary judgment was granted to the defendants. Saavedra appeals.

I. Standards of Review

Proceedings to enforce labor standards of the Act are on the record. See 29 C.F.R. §§ 6.10, 6.14. These proceedings are governed generally by the Administrative Procedure Act (APA). See 5 U.S.C. §§ 556, 557, 706.

A. Review Under the APA

Under the APA's judicial review provisions, a court must set aside agency decisions that are "unsupported by

substantial evidence" or "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A), (E).

The standard does not change merely because the final decision rejects the ALJ's determinations. Loomis Courier Service, Inc. v. NLRB, 595 F.2d 491, 495 (9th Cir. 1979). The decision for court review is that of the agency, here the administrator's decision adopted by the Secretary. The court does not review the ALJ's decision, which is merely part of the record. Penasquitos Village v. NLRB, 565 F.2d 1074, 1076 (9th Cir 1977).

But the court must take into account the "whole record." Id.; 5 U.S.C. § 706. Because the ALJ's factual findings are part of that record, contrary agency findings are given less

weight than they would otherwise receive. Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951); Nelson v. Interior Board of Land Appeals, 598 F.2d 531, 534 (9th Cir. 1979). This principle has greatest force, however, with credibility determinations from demeanor evidence, not at issue here.

B. Special Standards for Service Contract Proceedings

The APA treatment is modified by laws governing enforcement proceedings under the Act. The Secretary's findings of fact, if supported by a preponderance of the evidence, are conclusive on the courts. 41 U.C.S. §§ 39, 353(a).

A regulation binding on the agency provides: "With respect to [the ALJ's] findings of fact, the Administrator shall modify or set aside only those findings that are clearly

erroneous." 29 C.F.R. § 6.14. Findings are clearly erroneous if, though there may be evidence to support them, the reviewer has the definite conviction they are mistaken. Thomas v. SS Santa Mercedes, 572 F.2d 1331, 1335 (9th Cir. 1976).

II. Application of the Standards of Review

Because wage determinations are creatures of contract and statute, this case presents a mix of contract law and administrative law. The ALJ followed contract law.

Federal law controls when interpreting a government contract. In fashioning federal rules, guidance is gained from general principles for interpreting contracts. United States v. Seckinger, 397 U.S. 203, 209-11 (1970). Once the ALJ decided that provisions in the contracts affecting the amount

Saavedra owed were ambiguous, he applied the "contra proferentem" rule of construction, interpreting ambiguities against the drafter, the government. See id. at 210, 216.

The administrator concluded the contra proferentem rule was inapposite and applied administrative law. He reasoned that, because Saavedra did not know of these terms when he submitted his bid and had not paid even the lesser amount, he had not relied on his interpretation and was not prejudiced by the imperfections. See, e.g., Dale Ingram, Inc. v. United States, 475 F.2d 1177, 1185 (Ct. Cl. 1973).

He agreed with the government's argument that ambiguities should not be interpreted against Saavedra's employees, the intended beneficiaries of the provisions and the Act. Accord, Restatement

(Second) of Contracts § 207 (1979) (when interpreting contracts, a meaning that serves the public interest is preferred).

He reasond that the contracts incorporated the Act, which mandates use of the Secretary's wage determination. Saavedra had a legal duty to conform to the actual wage determination, not just a contractual duty to conform to plausible interpretations of contract provisions embodying the wage determination.

Administrative precedent imposed on Saavedra a duty to clarify any uncertainties about the wage determination. The ALJ found these cases were not meaningfully available to the public and in fairness Saavedra could not be held to them. Saavedra's attorney submitted affidavits that he could not find the precedents published.

The administrator set aside the ALJ's finding of unavailability, saying that the Department's decisions were published and properly indexed in regular services. He gave published citations for some relied on.

Moreover, a published regulation specifies that if doubts arise about interpreting the wage determination, the Department should be consulted. 29 C.F.R. §4.101. Saavedra is charged with such knowledge.

A. Ambiguities in Method of Computation

The wage determination specifies minimum time an employee must work to qualify for each benefit. It was drafted with a view to employees who work exclusively on government contracts. But Saavedra's employees did commercial work, too.

Saavedra argued that only time spent in contract work went to satisfy the minimum time requirement. The Department argued that both contract and commercial time should be counted to establish eligibility, with the benefit prorated to reflect the percentage of time spent on contract work.

The parties disagreed on how to prorate the benefit. Saavedra contended the percentage should reflect the ratio of contract time to total time worked. The Department would use the ratio of contract time to the minimum time specified to qualify for the benefit.

The Department produced a 1970 opinion letter prescribing its method. A government witness testified that the letter exemplified the Department's consistent and longstanding policy.

Saavedra argued that this had

to be published before it could bind him and was therefore void. The ALJ disregarded the letter. The administrator disagreed.

It is well settled that an agency may announce and implement new administrative policy by adjudication. Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982). A fortiori, it should be able to apply longstanding (though unpublished) policy in an adjudication.

The administrator was not obliged to rule for Saavedra simply because the policy was unpublished. Cf. Legal Aid Society v. Brennan, 608 F.2d 1319, 1341 n.43 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980) (Department of Labor Technical Guidance Memorandum entitled to weight because it reflected the agency's construction, even if not

binding because unpublished). Courts accord deference to an agency's reasonable and conforming interpretation of its own regulation. Pacific Coast Medical Enterprises v. Harris, 633 F.2d 123, 131 (9th Cir. 1980).

The opinion letter parallels the Department's published methods, which count commercial time in computing eligibility for annual vacation benefits. 29 C.F.R. § 4.171. Cf. Skidmore v. Swift, 323 U.S. 134, 140 (1944) (weight to be given to Department's bulletin interpreting statutory labor standards depends in part on consistency with its other pronouncements). The published examples are explicitly said to be illustrative and not exhaustive. 29 C.F.R. § 4.101.

Saavedra characterizes the Department's methods as arbitrary and capri-

cious. But with his method of prorating, an employee with the same contract hours as others would get a lower benefit if he put in more commercial hours. Adopting that method would have been arbitrary and capricious.

B. Ambiguity Because of Illegible Number

According to the ALJ, the monthly health and welfare benefit in the first contract was ambiguous because the figure was poorly reproduced. Though the amount was supposed to be $88.35, the ALJ computed Saavedra's liability as $38.35 under the contra proferentem rule.

The administrator set aside this part of the ALJ's decision. He stated that the disputed 8 was obviously not the same as the 3 in the same figure.

Whether an ambiguity exists is a question of law. United States v.

Sacramento Municipal Utility District, 652 F.2d 1341, 1343-44 (9th Cir. 1981). The administrator concluded there was no ambiguity here. This he was free to do. His "clearly erroneous" standard for reversing the ALJ's factual findings is inapplicable. Even if the existence of an ambiguity seems a factual question, the administrator reasonably thought the ALJ's finding clearly erroneous.

He buttressed his reversal by alternatively resolving the legal issues raised if an ambiguity did exist. See supra. He added that the contract would violate the wage determination if read as did the ALJ. The latter's interpretation resulted in an illegal, subminimum health and welfare benefit. An interpretation giving a lawful meaning is preferred. Restatement (Second) of Contracts § 203(a) (1979).

CONCLUSION

We too are not favorably impressed with the government's obfuscatory practices in these contracts. Wage determinations have significant financial consequences for government contractors. The Department, having received numerous inquiries about the same provisions that confused Saavedra, was aware of the problems. A government agency should set forth clearly its legal requirements. This one is capable of doing so, as it demonstrated by eliminating, in the second contract, the ambiguity about whether to count noncontract time when computing eligibility for the health and welfare benefit.

Straightforward notice would foster the purposes of the Act by promoting understanding of, planning for, and expeditious compliance with wage

and benefit provisions. It would also save the cost to the public of enforcement proceedings and litigaion against unwitting violators.

However, a businessman is presumed to assent to the terms of his contract whether or not he knows of them. Restatement (Second) of Contracts § 23 & comment b, § 157 & comment b.

Allowing one to avoid contractual obligations by failing to read or understand them would undermine reliance on written instruments and, in this case, disadvantage blameless employees. Saavedra had a duty to read the contracts. He owed that to himself, as he was bound by their terms, read or unread, and by the extra-contractual wage determination. His failure to read prevented him from even discovering alleged ambiguities, much less detri-

mentally relying on his interpretation of them or clarifying them before contracting.

The Secretary's decision was not arbitrary nor capricious, was in accordance with law, and was supported by substantial evidence. Most of his reversals of the ALJ were on legal issues. His conslusions on these conformed to the Act's purpose and to departmental policy, published and unpublished. Reversals of factual findings were limited to those he reasonably considered clearly erroneous.

Affirmed.

APPENDIX B

ORDER OF THE COURT OF APPEALS
DENYING PETITION FOR REHEARING
(April 15, 1983)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GUILLERMO A. SAAVEDRA, individually and doing business as SAAGAN MOVING & STORAGE COMPANY,	FILED APR 15 1983 PHILLIP B. WINBERRY CLERK, U.S. COURT OF APPEALS
Plaintiff/Appellant,	
vs.	NO. 82-4130 D.C. No. C-80-591-RHS (Northern Calif.)
RAYMOND DONOVAN, Secretary of Labor, et al.,	
Defendants/Appellees.	ORDER

Before: DUNIWAY, WRIGHT, and CHOY, Circuit Judges:

The petition for Rehearing, filed with the Clerk on February 18, 1983, has been considered and is denied.

APPENDIX C

DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

211 Main Street, Suite 600
San Francisco, California 94105

(415) 556-0555

In the Matter of G. A. SAAVEDRA, INDIVIDUALLY, d/b/a/ SAAGAN MOVING & STORAGE COMPANY, Respondent	NO. SCA-717-718

Jerry K. Cimmet, Esquire
Milano & Cimmet
Civic Center Building
507 Polk Street
San Francisco,
California 94102
For the Respondent

FILED AS PART
OF THE RECORD
10 APR 1978
Dated
/s/ H. STEPHAN GORDON
Chief Judge

Sandra Rogers, Esquire
Department of Labor
450 Golden Gate Avenue
Room 10404
San Francisco,
California 94102
For the Government

Before: THOMAS SCHNEIDER
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351 et seq., hereinafter, the "Act." Complaint was filed by the Regional Solicitor of Labor on August 30, 1977, alleging that Respondent violated the Act by breaching the provisions of two contracts for moving services identified as GS-09T-67 (hereinafter "contract 38") and GS-09T-67 (hereinafter "contract 67"). The essence of the complaint is that Respondent failed to pay employees doing work on each of the contracts the fringe benefits called for by the applicable wage determination. Respondent answered and raised various affirmative defenses. The issues thus framed are: (1) how the amounts for which Respondent is liable under the Act are to be determined and (2) whether unusual circumstances exist

which should relieve Respondent from the debarment provisions of 41 U.S.C. & 354(a).

A hearing was held in San Francisco, California, on November 9, 1977. The record was held open to March 6, 1978, for the submission of futher evidence and briefs. The subsequently received documents were received in evidence and consist of 53 pages of computation sheets, marked Secretary's Exhibit 13, a summary of unpaid wages, marked Secretary's Exhibit 14, and a recap sheet marked Secretary's Exhibit 15.

Findings of Fact and Conclusions of Law

Negotiations, Contract Documents, Investigation

The Solicitation, Offer, and Award for Contract 38 was prepared in part on Standard Form 33, (Nov. 1969). The Solicitation was issued on or about April 28, 1975, and the offer was signed by Respondent on or about June 3, 1975. The award indicates it was signed for

the United States by Hugh McLuskie on June 20, 1975. The original contract was introduced as Secretary's Exhibit #1, and contains several flaws. Although page 1 indicates it is one of 20 pages, in fact there are 27 pages since GSA Form 2166 (2 pages) and GSA form 2952 (5 pages) are attached. The amount of award is written as $95,000,000 although it was obviously intended to be $95,000.00. Page 3 and 4, entitled "Solicitation Instructions and Conditions" are poorly reproduced so as to be difficult to read. Page 6 incorporates by reference the text of the Act appearing on GSA Form 2166 which is reproduced poorly so as to be difficult to read in part. The rest of page 6 is legible but confusing. It sets forth the wages and fringe benefits that would be paid truck drivers,

helpers, and packers if they were paid by the federal government under 5 U.S.C. § 5341. This is confusing because these wages have nothing to do with wages under the contract. They are set forth merely as illustrations of what one employer (the U. S.) would pay for presumably similar work. A government witness testified that bidders often have questions about this page. In fact, testimony before the House subcommittee considering the Act prior to its passage warned that these figures would be confusing. Shlemon, "The Service Contract Act - A Critical Review," 34 Fed. Bar J. 240, 247 (1975).

Respondent testified that it is these figures on page 6 that he used in preparing his bid, and I credit this testimony because he had no conferences with any government official prior to submitting his bid on contract 38.

Pages 7 and 8 are "Exceptions and additions to Standard Forms 33 and 33A, (cont'd)" and are more or less legible. Pages9, 10, 11, 12, 13 and 14 are "Supplemental provisions" and fairly legible. Pages 15, 16 and 17 appear to be continuations of the Supplemental provisions, but are also the pages on which the offeror (bidder) puts in his figures on the basis of which it appears that the award will be made, and fills in the name, address and telephone number of a person to be contacted. These pages are legible. Page 18 is the wage determination (No. 66-190(Rev.9) Dated: August 30, 197_ [last digit illegible]) which the government contends is applicable here. In addition to being poorly reproduced so that some words are difficult to read, it contains at least two substantive errors on its face. (1) It specifies the same minimum

hourly wage ($7.19) for a helper as for a foreman, and (2) numbers which obviously refer to footnotes under columns for Minimum Hourly Wage, Health and Welfare, Vacation, Holiday, and Pension go from 1 to 5, but the footnotes only go from 1 to 4. It appears from the evidence that it was intended that each of the numbers from 1 th 4 should have been moved to the right one column, and that the number 5 should have been omitted.

Furthermore, the first figure of the text at footnote (1), (which should have referred to Health and Welfare but literally referred to Minimum Hourly Wage) was so unclearly written that although the government contends that it says "88.35" a government witness admitted it might be read as "33.35," and the compliance officer pencilled in "$88.35" on his copy of the contract to make it more legible.

Pages 19 and 20 of the contract are out of order (page 20 preceded page 19 in the collated document) and are wage determination 66-491 (Rev.8). The inclusion of this wage determination is confusing for the same reason that page 6 is confusing, i.e., that it refers to wages for Marin County which have no relevance to the work bid for by Respondent, which is for San Francisco County only. Even a government witness was confused by this. See Tr. 15:21-16:10. The remaining seven pages are printed forms previously described.

Respondent testified that he did not receive page 18 until after he made his bid. I do not credit his testimony in this respect because he later admitted he was not sure and because page 18 is on the other side of page 17, which contains blanks that appear

to have been filled in prior to the submission of the bid. Although there was conflicting testimony, the following is the most credible account of pre-award negotiations:

In the week prior to June 20, 1975, Mr. Orange, who at the time assisted the contracting officer, Mr. McLuskie, and Respondent had a meeting. Fringe benefits were not discussed at this meeting. However, since Respondent's bid seemed low, Mr. Orange called Respondent's attention to the minimum hourly wage set forth on page 18. In fact, except for two relatively insignificant instances, Respondent paid those wages. Respondent had calculated his bid on the much lower wages shown on page 6 of the contract. Shortly after this meeting, and prior to receiving written notice of the award of the con-

tract, Respondent called the contracting officer, Mr. McLuskie, in an attempt to withdraw his bid. Respondent testified that his reason for attempting to withdraw was other work and not his miscalculation on his bid, but the inference seems reasonable that the miscalculation was nevertheless a contributing reason. In any event, Mr. McLuskie threatened Respondent with "something like if I didn't perform or he will see that I will get -- he will get me broke to the point where I won't have any place to sleep." Tr. 186:15-18.

The bid was not withdrawn and the written award is dated June 20, 1975.

There were two subsequent changes to contract 38. The first, dated October 24, 1975 changed page 18, the allegedly applicable wage determination, to reflect that foremen should get paid more than helpers. The second,

dated March 26, 1976, made some changes not relevant here.

Mr. Lawrenz, a Department of Labor compliance officer started investigating Respondent's compliance with contract 38 in May 1976. By May 27, 1976, the date when Respondent submitted his offer on contract 67, the government was holding $9,000.00 from Respondent on contract 38. In order to stay on the list of firms to which solicitations are sent Respondent decided to bid on contract 67. His bid was substantially higher than his previous bid, and he did not expect to get the award. He was not specifically informed of violations on contract 38 until June 11, 1976, about two weeks after submitting his bid on contract 67. The award was signed for the United States on June 14, 1976.

Contract 67 is completely legible. In marked distinction to contract 38 it bears the following language on the first page: "The Service Contract Act of 1965 applies to this solicitation and the contractor and or subcontractor must pay the wages and fringe benefits as shown on Wage Determination on Pages 18 and 19."

Certain ambiguities urged by Respondent even in contract 67 will be discussed below.

By the time of the hearing the Government, pursuant to an agreement with Respondent and his attorney, was withholding in excess of $39, 000.00. (Secretary's Exhibit 15.) The first group of issues to be decided is by what formulas the amounts owing to the several employees should be determined. The second issue is whether special

circumstances exist to warrant a recommendation that Respondent not be debarred from further government work pursuant to 41 U.S.C. § 354(a); 29 C.F.R. § 6.10 (b).

Interpretation of the Contracts

CONTRACT 38

Respondent first argues that he is not bound by the wage determination on page 18 of contract 38 because he relied on the wages shown on page 6; and that even though he paid no fringe benefits, as such, his wage payments exceeded the wage payments plus fringe benefits set forth on page 6. Thus, page 6 lists truck drivers as receiving $6.20 per hour plus 9 percent for retirement, insurance and health, plus certain holiday leave, sick leave and vacation leave. $6.20 plus 9 percent equals $6.20 plus .558 or $6.758 per

hour. Respondent actually paid his truck drivers $7.165--well in excess of the amount shown on page 6, even including the various leave benefits.

The Act permits equivalent or differential payments in cash in lieu of fringe benefits. 41 U.S.C. § 351(a)(2). However, Respondent knew at least of the minimum wage requirements (if not the fringe benefit requirements) of page 18 prior to award and cannot subsequently claim reliance exclusively on page 6. Furthermore, 29 C.F.R. § 4.170(a) states: "When an employer has not made any provisions for fringe benefits, he cannot offset an amount of monetary wages paid in excess of the wages required under the determination, in order to satisfy his fringe obligation under the Act." Therefore, I conclude that he is bound by the wage

determination, although not the Solicitor's interpretation of it.

Health and Welfare

The compliance officer computed the amounts underpaid for Health Welfare on the assumption that the wage determination required a contribution by the employer of $88.35 per month for each employee who has completed 80 hours of work straight time for the employer in the previous calendar month, including both commercial work and work under the contract. He pro-rated the amount of contribution due for employees who worked less than 80 hours in any month on contract work by multiplying $88.35 by a fraction, the numerator of which is the number of hours worked on contract work that month and the denominator of which is 80.

As previously noted, the amount

written in footnote (1) on the wage determination (Secretary's Exhibit 1, p. 18) is unclear. I find that it can reasonably be read either as $88.35 or as $38.35. Resolving ambiguities against the drafter, United States v. Seckinger, 397 U.S. 203, 210, 216 (1970), I conclude that computations should be based on $38.35.

The wage determination requires payments "for each employee who has completed 80 hours straight time employment in the previous calendar month." it does not specify whether the 80 hours is to include both contract work and commercial work, as assumed by the compliance officer, or contract work only, as urged by Respondent. To take one example, Danny Exon (Secretary's Exhibit 10, pages A-7, et seq.) worked more than 80 hours all together in each

of the seven months from October 1, 1975 through april 1976. However he worked more than 80 hours on contract work in only two of those months, December and April. Respondent urges that this employee is entitled to Health and Welfare benefits only in the two months following December and April. If the contract itself specified clearly which hours count as qualifying, as contract 67 does (Secretary's Exhibit 4, page 18) there would be no problem. (See p. 10, below.) If there were a published regulation specifying the same matter the parties would be bound by it.

However, contract 38 does not specify and there is no published regulation. Instead the Solicitor relies on a copy of a letter, dated July 10, 1970, from the then Assistant Administrator to an attorney whose name

has been deleted. (Secretary's Exhibit 11). The letter appears to deal with the instant question as it arose in a specific case under a prior, presumably similar, wage determination. It clearly supports the compliance officer's approach, urged here by the Solicitor. It may be evidence of an administrative practice, but it cannot be binding on a private citizen. City of New York v. Diamond, (SDNY 1974) 379 F.Supp. 503, 516, 518. The scheme of the Act as a whole supports Respondent's contention. Thus, the Act requires that minimum wages be paid "in the performance of the contract," not to all employees who may sometimes work on the contract. 41 U.S.C. § 351(a)(1). It requires that fringe benefits be furnished to employees "engaged in the performance of the contract," not to all employees of the contractor. 41 U.S.C. § 351(a)(2).

"Service employee" is defined as "any person engaged in the performance of a contract..." 41 U.S.C. § 357(b)(emphasis added). 29 C.F.R. § 4.146 states that the contractor "is required to comply with the provisions of the Act and regulations thereunder only while his employees are performing on the contract..."

The Solicitor suggests an analogy to 29 C.F.R. § 4.171(b)(2), which refers to vacation benefits. Vacations, which are based on years of service with an employer may well be subject to different considerations than Health and Welfare benefits which are based on hours worked. Rather than supporting the Solicitor, the regulation shows that a regulation could easily be written that would support him. See Diamond Roofing v. Occu-

pational S. & H. Rev. Com'n., (5 Cir. 1976) 528 F. 2d 645, 648-649.

These considerations lead me to conclude that Respondent was not required to pay Health and Welfare benefits for any employee who worked less than 80 hours on contract work during the previous month.

Of course, Respondent was obliged to pay into the special (H&W) Fund, 10 cents per hour for all hours worked on contract work. There seems to be no dispute between the parties on this point, and the compliance officer made his computations accordingly.

The parties disagree about how Health and Welfare benefits should be prorated for those employees who only worked on contract work a portion of the time in any month. The solicitor urges that the compliance officer did

it correctly by using a fraction, the numerator of which is the number of hours worked (up to 80) on contract work and the denominator of which is 80. Respondent contends that the denominator should be the total number of hours worked on contract and commercial work.

Again, there is neither contract language nor a regulation that specifically deals with this issue. The Solicitor relies on the same letter previously discussed (Secretary's Exhibit 11). For the same reason it is not controlling here. Since the scheme of the Act is to assure that employees are compensated in accordance with certain standards while working on the contract, it makes sense to pay Health and Welfare benefits in proportion to the amount of work done on the contract in any given month. This can be computed by using the

total number of hours worked as the denominator and the number of hours worked on the contract as the numerator. To use 80 as the denominator is arbitrary. Accordingly, I conclude that the proper way to compute the amounts underpaid for Health and Welfare (not including the ten cents per hour for the special (H&W) fund) each month is first to determine eligibility by determining which employees have worked more than 80 hours on contract work the previous month. Then, as to those employees found eligible, to multiply $38.35 by a fraction, the numerator of which is the number of hours worked on contract work in the subject month, and the denominator if which is the total number of hours worked both on commercial and on contract work.

Vacation

The wage determination (Secretary's Exhibit 1, p. 18) provides in part: "Any employee laid off shall be entitled to prorate [sic] vacation pay."

"Laid off" has a commonly accepted meaning which implies something other than "fired for cause" or "quit." The American Heritage Dictionary (1976) defines lay off as follows: "To suspend from employment, as during a slack period." Mr. Orange, a contracting officer of considerable experience, testified similarly. Tr. 50:10-16. There is no reason to interpret this language in the contract otherwise. On the basis of Respondent's Exhibit E, I find that none of the employees for whom the compliance officer computed pro-rated vacation payments under contract 38 were laid off during the term

of contract 38 so as to be entitled to pro-rated vacation pay. This leaves only employees Enele, Graeven, Jones, Mutony and G. Phillips, each of whom worked for Respondent for more than a year prior to the expiration of contract 38, who may be entitled to some vacation pay in addition to vacation taken or vacation pay received.

Since each of these worked for Respondent for less than three years, each of them is entitled to "10 working days paid vacation, computed on the basis 96 hours at the straight time rate of pay." (Secretary's Exhibit 1, p. 18). This computation requires determining the ratio of contract hours worked to total hours worked (contract and commercial). The compliance officer did this approximately by averaging the monthly percentages. To do it more precisely the proper procedure is to add up the total

number of hours worked (both contract and commercial) during the contract year and enter that number as the denominator of a fraction. The numerator of the fraction is obtained by adding up the total number hours worked on contract work during the contract year. The resulting fraction is the fraction of time the employee spent on contract work. The hourly wage rate called for in the wage determination is multiplied by 96 hours and then multiplied by the fraction to obtain the dollar amount of vacation pay to which the employee is entitled under contract 38. For example, Stephen Mutony (Secretary's Exhibit 10, pp. A-15, et seq.) worked a total of 1653. 25 hours for Respondent in the contract year from July 1, 1975 through June 30, 1976. Of these hours 969.25 were spent on contract work. The fraction of time worked on contract work is 969.25

divided by 1653.25. The hourly wage rate called for is $7.165. $7.165 X 96 X 969.25 divided by 1653.25 equals $403.25.

This amount is only slightly different from the $398.95 computed by the compliance officer. Nevertheless, Respondent is entitled to precision. Of course, Respondent is entitled to credit for vacations actually taken or vacation pay paid, as the compliance officer correctly computed.

Holidays

The wage determination (Secretary's Exhibit 1, p. 18) specifies that there are 11 paid hoidays per year "provided the employee has been employed by the employer for at least 13 days in the month in which the holiday occurs." The same question arises here as in the Health and Welfare area, to wit, does "13 days" refer to both contract and com-

mercial work for the employer or does it refer to contract work only? Nor is there anything to suggest whether full days or partial days are meant. In the absence of clear contractual language or governing regulation, Respondent is entitled to have such latent ambiguities resolved in his favor. Accordingly, I conclude that Respondent was required to pay holiday pay only for those employees who worked 104 hours or more (8X13) on contract work in the month in which the holiday occurs. With this interpretation of the wage determination language it becomes unnecessary to apportion the amount paid for holiday pay. If the employee qualifies for the benefit in any month, he is entitled to one full day's pay at the straight time contract rate for eight hours for any holiday on which he works.

Pension

The wage determination specifies that pension benefit payments are "3.70 a day for each employee who has worked at least for hours in that day." The same ambiguity exists here as with Health and Welfare and Holiday benefits, i.e., does the "four hours" refer to four hours of work done on both commercial and contract work together, or does it refer only to work under the contract. Again, absent clear contract language or specific regulation, Respondent is entitled to have such amibiguity resolved in his favor. Accordingly, I conclude that Respondent was required to make a $3.70 payment only to such employees as worked more than four hours in any day on contract work. This precludes the necessity of further apportioning the amount of contribution.

Minimum Wage

There appears to be no dispute between the parties that David Freeman and Bernd Liebelt were underpaid $30.60 and $31.24 respectively. I find this underpayment to have been inadvertant and due to Respondent's method of keeping track of contract hours.

CONTRACT 67

Health and Welfare

The amounts required to be paid by the wage determination (Secretary's Exhibit 4, p. 18) was clearly printed, i.e., $92.68 a month. Furthermore, this wage determination specified that: "The contractor must count the time an employee has spent working on regular commercial work as well as time spent on contract work in determining an employees [sic] eligibility." Thus, two of the ambiguities contained in contract 38 have been

eliminated, and there is no occasion for resolving them.

Respondent contends, however, that there is no regulatory basis for the quoted language and that it is contrary to the intent of the Act. I know of no authority that requires every word or phrase or clause of a government contract to be founded on a regulation. Of course, a contract must not conflict with the Act, but the language in question does not conflict with the Act. 41 U.S.C. § 351(a)(2), in requiring fringe benefits to employees "engaged in the performance of the contract," does not preclude a computation that takes into account all the work an employee does for an employer while "engaged in the performance of the contract" only part of the time. As stated in the discussion of contract 38, supra, I believe the scheme of the Act would support

Respondent's contention. But such general principles do not vitiate express contract language.

The wage determination further states: "An employee who has worked 80 hours or more in the preceeding [sic] month is entitled to the listed amount in the current month of employment regardless of the number of hours so [sic] worked in the current month." Although not very clear, the effect of this sentence appears to be twofold: (1) to clarify that eligibility depends on work in the previous month, not in the current month and (2) to state that an employee who works 80 hours on contract work is entitled to the full $92.68 benefit. The wage determination continues: "However, an employee who met the 80 hour test but who worked less than 80 hours on contract work would only be

entitled to that pro-rata portion of the specified amount based on his hours worked on the contract work." "Pro-rata" as used here has an ordinary meaning, namely that the employee who works less than 80 hours on contract work is entitled only to that fraction of $92.68, the numerator of which is the number of contract hours worked and the denominator of which is the total number of hours worked on both commercial and contract work.

I therefore conclude that the appropriate method for computing Health and Welfare benefit payments under contract 67 (in addition to 10 cents an hour for the special (health and welfare) fund) is (1) to determine which employees have worked a total of 80 hours in a month on both contract and commercial work. These employees are eligible for

some Health and Welfare benefit payment. (2) Those employees who have worked 80 or more hours on contract work are entitled to a payment of $92.68. (3) Those who have worked less than 80 hours on contract work are entitled to $92.68 multiplied by the number of hours worked on contract work divided by the total number of hours worked both on contract and commercial work.

Vacation

The language regarding vacation in contract 67 (Secretary's Exhibit 4, p. 18) is identical to the language in contract 38. The discussion and conclusion there apply here, except that seven additional employees of Respondent had been employed for over one year at the expiration of contract 67. For each of them the computations described in respect to contract 38 will have to be

made. In addition, as the Regional Solicitor in his letter of December 1, 1977, has conceded, it will be necessary to make adjustments for those employees who took or were paid for vacations subsequent to June 30, 1977. Respondent, if he has not yet done so, should make the necessary records available to the Solicitor so that such adjustments can be made.

Holiday

The language in contract 67 (Secretary's Exhibit 4, p. 18) respecting holiday benefit payments is identical to the language in contract 38. Therefore, the same discusssion and conclusions apply.

Pension

The language respecting pension benefit payments in contract 67 (Secretary's Exhibit 4, p. 18) is identical

to the corresponding language in contract 38, except that the amount is $4.40 rather than $3.70. Except for this difference in dollar amounts, the same discussion and conclusions apply.

Sick leave

Contract 67 (Secretary's Exhibit 4, p. 18) requires certain benefit payments for sick leave. However, the Solicitor does not contend that this portion of the contract has been violated.

Credit for health insurance payments

Commencing in August 1976 the Respondent had a health insurance plan available for employees that chose it. Respondent would contribute one-half the cost and the employee would contribute the other half. Some employees had a more expensive plan that covered families as well as the individual employee. In both cases Respondent and the

employee concerned paid equal amounts. In computing the amount of underpayment for Health and Welfare by Respondent under contract 67, he should be given credit for the contributions he made. The precise amounts of those contributions should be made on the basis of Respondent's books rather than his bookkeeper's testimony. If the relevant figures from these books are not now available to the Solicitor, Respondent should make them available.

Precedents applicable to both contracts

In reaching the foregoing conclusions I have not relied on several decisions by administrative law judges and by the Assistant Secretary of Labor which were cited by the Solicitor. The cited decisions are available to the public only by name and number and are not indexed by subject matter. It is

therefore impossible, from a practical standpoint, for an attorney to find decisions that may be favorable to his client. (This statement is based on an affidavit by Respondent's counsel which has not been controverted).

The very able attorneys in the Solicitor's office may be expected to be familiar with these decisions because of their thorough knowledge of the proceedings that result in these decisions. It would give the Solicitor an unfair advantage, in an adversary setting such as this, to rely on data which only he has the means of retrieving.

Nevertheless, it is clear that to some degree Respondent has committed a violation of the Act, and I so find.

"Unusual Circumstances"

Pursuant to the provisions of 29 C.F.R. § 6.10(b) I hereby recommend

to the Secretary of Labor that the Respondent should be relieved from the application of the ineligible list as provided in section 5(a) of the Act, 41 U.S.C. § 354(a). I find that the following are unusual circumstances, upon which I rely as reasons for the recommendation: contract 38 was the first contract Respondent ever had with the federal government and contract 67 the second. When Respondent tried to withdraw his bid, he was threatened with action that would cause his bankruptcy. By the time of his bid on contract 67 he had not yet been specifically told of contract violations, but felt duress because the government was withholding $9,000.00. He was afraid that he would not get any further government contracts if he did not submit a bid. When specific violations were called to his attention,

and he had assistance of counsel, an agreement was reached for withholding sufficient amounts to insure that employees would be paid all amounts found due, in accordance with 41 U.S.C. § 352(a). Respondent at the hearing evidenced the fact that he does not speak English perfectly. He usually has only five or six employees and is, like many people, reluctant to seek an attorney's advice until after problems have been called to his attention. Furthermore, contract 38 was confusing and sloppy. Contract 67 was less sloppy but still contained the ambiguities discussed above.

Upon consideration of the entire record in this matter, it is hereby

ORDERED, that the amounts due from Respondent be computed by the Department of Labor in accordance with the

principles set forth in the foregoing decision; that thereafter the amount withheld in excess of the amounts due be paid to Respondent; and the amounts that should have been paid Respondent's employees be distributed to them, and any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts (41 U.S.C. § 354(b)). It is also

RECOMMENDED, that the Secretary of Labor take affirmative action to relieve the Respondent from the ineligibility list provisions of Section 5(a) of the Act, 41 U.S.C. § 354(a).

Dated on the 10th day of April, 1978 in San Francisco, California.

/s/ Thomas Schneider
THOMAS SCHNEIDER
Administrative
Law Judge

TS:tl

APPENDIX C-1

DECISION OF THE ADMINISTRATOR

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

CASE NO. SCA-717-718

In the Matter of G. A. SAAVEDRA, an individual, doing business as SAAGAN MOVING & STORAGE COMPANY, Respondent	U. S. Department of Labor Office of Administrative Law Judges FILED AS PART OF THE RECORD Feb. 26, 1979 s/H. Stephan Gordon Chief Judge DECISION OF THE ADMINISTRATOR

This is a proceeding under the McNamara-O'Hara Service Contract Act of 1965 (79 Stat. 1034; 41 U.S.C. 351, et seq.), as amended, hereinafter referred to as the Act. The respondent was charged with having violated the Act in the performance of two contracts for moving services, Nos. GS-09T-38 (Secretary's Exhibit 1) and GS-09T-67 (Secretary's Ex. 4), hereinafter referred to as contract 38 and contract 67, respectively.

A hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge. Thereafter briefs were sub-

mitted by the parties. On April 10, 1978, the Judge issued his decision in the matter. He found that the respondent violated the Act and the contracts by failing to pay employees who performed the contracts the minimum wages and fringe benefits as required by wage determinations which were attached to and part of the contracts. However, the judge did not agree with the prinicples and methods employed by the Government in determining the amounts due the employees on account of the underpayments. He ordered that such amounts be re-computed in accordance with the principles set forth in his decision. The Judge found that there were "unusual circumstances" in the case within the meaning of Section 5(a) of the Act (41 U.S.C. 354(a)), and therefore recommended that the respondent be relieved from the ineligible list sanction provided in that section.

The Government filed exceptions to the decision. The repondent responded thereto, and

agency and not the Department of Labor) was as adamant as can reasonably be expected in his belief. His "concession" that another reading is possible is not convincing and merely concedes that anything can be possible. The Judge was wrong in relying on this colloquy for support of the conclusion he reached on this vital matter.

Furthermore, the Judge knew (Decision, p. 10) that Wage Determination 66-190 (Rev. -10) which applied to Contract 67 clearly required $92.68 per month in health and welfare fringe benefits. It makes no sense to accept an increase from $33.35 to $92.68 between one year and the next. It is more reasonable to presume an increase from $88.35 to $92.68 over the period. The Judge could also have requested the preceding Wage Determination, 66-190 (Rev. -8), which shows the same benefit as $77.52. By so doing, it would have become apparent that there was a steady increase in the rate between October 1973 and September 1975 from $77.52 to $88.35 to $92.68.

I believe that the views of the Government with respect to the monthly amount provided for health and welfare in contract 38, as expressed in the above quotation are correct, for the reasons stated by the Government as well as those indicated herein. A study of the configurations of the four digits which make up the dollar amount per month payable

for health and welfare appearing at the beginning of footnote 1 of Wage Determination 66-190 (Rev. -9) (page 18 of contract 38, Secretary's Exhibit 1), particularly a comparison of the two digits to the left of the decimal point with the digit immediately to the right of the decimal, shows that the two digits to the left of the decimal are eights and the one to the right is a three and that the number which they form is $88.35, rather than $38.35 as found by the Judge.

The Judge's rationale for adopting the the $38.35 figure rather than $88.35 was that the amount written in footnote 1 of the wage determination was unclear; that it could reasonably be read either as $88.35 or as $38.35, and that "[r]esolving ambiguities against the drafter [of the contract]" computations of the amount due employees should be based on $38.35. In support of this conclusion, the Judge cited United States v. Seckinger, 397 U.S. 203, 210, 216

(1970) (Decision, p.6, 2d paragraph).

In my opinion, the rule that ambiguity in a contract should be resolved against the drafter is not apposite in the circumstances of this case. Careful reading of the footnote in question would make clear that the amount in question is $88.35, as indicated above. Moreover, when a contractor enters into a contract subject to the Service Contract Act he undertakes an obligation to ensure compliance with the requirements of the Act, which are incorporated in and part of the contract. (See Section 2(a) of the Act (41 U.S.C. 351(a)); Secretary's Exhibit 1, paragraph (a) at the top of page 6 and GSA form 2166 attached to the contract which incorporate the Act in the contract.) If he has any question with respect to such requirements he has a duty to inquire of the Department of Labor and obtain clarification. See the decision of the Assistant Secretary of Labor in Quality Maintenance Co., Inc. et al.

Case No. SCA-119, Dec. 28, 1973 (CCH, Labor Law Reporter, Wages-Hours, vol. 2, par. 30,906; BNA, 21 WH Cases 1094); McLaughlin Storage Inc., et al., Case No. SCA-362-365, Administrative Law Judge (1975), BNA, 22 WH Cases 711, Administrator (1976), 22 WH Cases 943. The respondent made no attempt to ascertain the amount of health and welfare fringe benefit provided in the wage determination. In fact, he was unaware that the contract required him to pay employees a health and welfare benefit or any of the other fringe benefits proved in the wage determination, according to his testimony. He did not consider such benefits in making his bid, and he did not pay them to the employees. (Transcript of the hearing, herinafter cited by "T.", pages 166, 168, 170, 173, 174, 180, 184, 185, 188-190) It is therefore clear that the respondent was not prejudiced in any way by any imperfection in the printing or format of the wage determination or in the figures

or wording contained therein.

The Administrative Law Judge's finding that the wage determination issued by the Secretary's authorized representative which was part of contract 38 required a monthly health and welfare benefit of $38.35 rather that $88.35, contravenes the provision in Section 2(a) of the Act and Section 4.170 of the regulations implementing it (29 CFR 4.170) that fringe benefits shall be furnished employees "as determined by the Secretary, or his authorized representative". (underlining supplied)

In determining the eligibility of individual employees to receive the health and welfare benefit, and in computing the amount due them for such benefit, the Government relied on the principles set forth in an opinion letter, dated July10, 1970, issued by the Administrator of the Wage and HourDivision, U.S. Department of Labor (Secretary's Exhibit 11). The Judge did not consider such opinion

letter binding and declined to follow it, although he stated that if the principles contained therein had been incorporated in the contract or in a published regulation the parties would have been bound by them. (Decision, pages 6-8)

The Government contends that it was error for the Judge to refuse to follow the Administrator's opinion letter. It states (at pages 3-5 of its exceptions);

> *** * * the Judge's refusal to accept either the Compliance Officer's formula for determining employee entitlement or computation of the health and welfare fringe benefit payable, i.e., taking into consideration both commercial work and work under the contracts to determine whether the employee had completed 80 hours of straight time work in the preceding calendar month and then multiplying $88.35 by a fraction established as total contract hours over 80, is wrong as a matter of law and should be rejected. The Judge acknowledged that an opinion letter of the Administrator (Secretary's Exhibit 11) "appears to deal with the instant question" and "clearly supports the compliance officer's approach" (Decision, p. 6). However, the Judge did not consider the letter to be binding and, in the absence of a published regulation in point, concluded (1) that employee eligibility depended on the performance**

of 80 hours of contract work in the preceding month, and (2) that the amount payable was then determined by multiplying $33.35 by a fraction established as total contract hours worked over total hours worked, both commercial and contract.

The Government submits that the exercise in statutory construction proffered by Judge Schneider for declining to follow the opinion letter of the Administrator (Decision, p. 7) is an insufficient foundation as it is undermined by his acceptance of the Government's approach under Contract 67 wherein the Wage Determination required consideration of both commercial and contract work in determining eligibility. If the Judge's analysis of the scheme of the Act is valid then logically he ought to have considered the language in the later Wage Determination under Contract 67 to be ultra vires (Decision, pp. 10-11). But he did not do so, taking the ground from under his attack on the propriety of the Administrator's opinion in respect to Contract 38. The Government therefore submits that it was incumbent upon the Judge to accept the rationale and determinative impact of the Administrator's opinion letter. See, Matter of Quality Maintenance Co., Inc., No. SCA-488, February 16, 1977, in which the Administrator supported the Government's argument that:

> Equally important under the circumstances is the accepted legal principle that on matters which have not been heretofore determined by tribunals 'it is necessary for the Secretary of Labor and the Adminis-

> trator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134),' 29 CFR 531.25(a). As the court stated in the cited case, interpretations of the Act by those charged with its enforcement 'provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it' and 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' Id. It has been said that interpretations of the law issued by the Administrator are entitled to great weight in deciding cases, Gustafson v. Fred Wolferman, Inc., 73 F. Supp. 186 (DC Mo. 1947), and that due consideration must be given the Administrator's interpretations, McComb v. Consolidated Fisheries Co., 75 F. Supp. 798 (DC Del. 1948), aff'd. 174 F.2d 74. See also Morris v. Beaumont Mfg. Co., 84 F. Supp. 909 (DC S.C. 1949); Martin v. McAllister Lighterage Line, 102 F. Supp. 41 (DC N.Y. 1951), aff'd 205 F.2d 623.

I find that the Judge erred in refusing to follow the principles enunciated in the opinion letter in question, and in ordering the eligibility of employees for the health and welfare fringe benefit and the amounts due

them therefor to be computed according to other principles set forth in his decision. I believe that the position of the Government on this question as stated in its exceptions is proper. In addition to the authorities cited by the Government, see 77 Am. Jr. 2d, United States, § 52, p. 54; Brennan v. Western Union, 561 F.2d 477, 482, 483 (C.A. 3, 1977). As noted above in the discussion of the monthly amount provided in the wage determination for this benefit, the respondent was not aware of the requirement to furnish employees any fringe benefits, and he failed to do so. Therefore, he was not prejudiced by the fact that the methods for determining eligibility and the amounts payable for such benefits, as stated in the Administrator's opinion letter in question, were not published in a regulation or specifically incorporated in the contract. In any event, as indicated above, a contractor is on notice concerning such obligations, and has a duty to inquire concerning

them if he has any questions.

The Government takes exception to the Judge's finding with respect to employee eligibility for the holiday fringe benefit, as follows (at pages 5 and 6 of its exceptions):

> **The same reasoning was used by the Judge in respect to holiday entitlement to strike down the Government's claim (Decision, pp. 9, 12) as he used to vitiate the claim for health and welfare fringe benefits, i.e. the Judge interpreted the wage determination requirement that "the employee has been employed by the employer for at least 13 days in the month in which the holiday occurs" to mean 13 full days of contract work. Since it has been demonstrated, supra, that had the wage determinations specified that commercial work also be taken into account the Judge would have decided differently; that admittedly the question is identical in the consideration of eligibility for both types of fringe benefits; and that the Administrator's opinion letter enunciates the Departmental interpretation as regards this issue, the Judge must be reversed in this regard also. The Government would also point out that the decision contains objectionable language in two other respects relative to this fringe benefit, which language should be corrected on appeal. First, employee eligibility for holiday pay does not, and should not, require employment for 13 full days. The entitlement is earned regardless of the**

number of hours worked during any one day. Only the failure to work any contract hours during the month precludes the vesting of an entitlement to holiday pay. While the Judge speaks of resolving ambiguities in favor of the respondent, there is just as much reason for resolving ambiguities in favor of the employees whom this remedial statute was intended to benefit. Second, holiday pay is due all eligible employees and not just those who actually worked on the specified holiday, contrary to the language in the final sentence on page 9 of the decision.

I find that the above quoted views of the Government concerning the Judge's findings with respect to employee eligibility for the holiday benefit are consistent with long-standing policies, practices, and interpretations of the Department and with the provisions and purposes of the Act, and they are proper. (T. 153-155)

The Govenrment contends that the Judge's finding with respect to employee eligibility for the pension fringe benefit (at pages 10 and 12 of his decision) is erroneous. The wage determinations provide for a pension benefit payment of a specified amount per day "for each employee who has worked at

least four hours in that day.". The Government states (at page 6 of its exceptions):

> Here, again, a question of interpretation of a wage determination requirement specified in terms of hours of work is presented. The Judge determined that eligibility for the pension fringe benefit requires four hours of contract work in any day. For the reasons expressed, supra, in respect to the admittedly identical issue presented in consideration of the health and welfare and holiday fringe benefits, the Government submits that employees who worked four hours on any given day (including commercial work) are eligible to receive pension benefits for that day, unless no contract work was performed on that day. The amount of pension benefits due for a given day should be prorated on the basis of the amount of contract work performed on that day. Thus, an employee who worked at least four hours, two hours of which were contract work, would be due one-half of the full benefit. This is the method utilized by the Compliance Officer and this method should be supported by the Administrator.

I find that the view of the Government with respect to the pension benefit as expressed in its exception quoted immediately above, is correct for the reasons indicated therein and in the discussion of the other fringe benefits herein above.

The Judge refused to consider prior adminis-

trative decisions in reaching his conclusions. The Government argues (at pages 6 and 7 of its exceptions), and I agree, that this was erroneous for the following reasons:

> The decision states, at pages 12-13, that the conclusions were reached without reliance on decisional law cited by the Solicitor since such decisions are not indexed by subject matter for the convenience of the public. To do otherwise, the Judge stated would "give the Solicitor an unfair advantage * * * [based on] data which only he has the means of retrieving." Needless to say, the Government is shocked by this approach which, in effect, decrees that such precedents never, or no longer, exist. The availability or nonavailability of precedents to the parties is no legal justification for a Judge refusing to acknowledge their existence in deciding the issues before him. By doing so, he violates the concept of stare decisis. A further reason for objecting to the Judge's approach in this regard is the fact that, contrary to the asertion of respondent's attorney in his affidavit of March 6, 1978, the administrative decisions under the Act are regularly published by three national reporter services: Commerce Clearing House's Labor Law Reporter/Wages-Hours, an indexed loose leaf service; Bureau of National Affairs' Wage and Hour Cases, a series of indexed bound volumes; and Prentice-Hall's Wage-Hour Guide, an indexed looseleaf service containing summaries of all decisional law under the

Act, and its Labor Relations Guide, another indexed loose leaf service in which summaries of the more significant decisions are reported. Of course, each of these services is readily available by subscription or can be found in law libraries or wherever other traditional reporting services' publications are found.

I have studied the evidence in the record and the arguments of the parties with respect to the issues, including the exceptions to the Judge's decision. In view of all the circumstances, the findings and conclusions of the Administrative Law Judge, as set forth in his decision dated April 10, 1978, are set aside to the extent that they are inconsistent with the conclusions reached herein. The case is remanded to the Judge for the limited purpose of computation of the amounts due the respondent's employees on the basis of the principles and methods found to be proper herein. Such computation should also be based upon the principles and findings stated by the Judge in his decision to the

extent that such principles and findings are not inconsistent with the conclusions which I have reached herein. Thereafter, the Judge should issue a new or supplemental decision restricted solely to findings as to the amounts so found due.[1/]

The Government takes exception to the Judge's finding that "unusual circumstances" exist in this case, and his recommendation that the respondent be relieved from the ineligible list sanction provided in Section 5(a) of the Act. At page 13 of his decision the Judge stated the reasons for his conclusion in this regard. In my opinion, the circumstances which he described involve "unusual circumstances" within the meaning

---

1/ The Government states that respondent "is indebted to his employees in the amount of $17,600.97, as specified in Exhibits A and B to the complaint, less allowable vacation credits under contract 67 for those employees who took or were paid for vacations subsequent to June 30, 1977 (Decision, p. 12), and allowable credit for health and welfare contributions made by respondent to the health insurance plan under contract 67 (ibid.)" (Government's exception, pp. 7-8.)

of Section 5(a). See the decision of the Assistant Secretary in Quality Maintenance Co., Inc., supra. Therefore, I concur in the Judge's finding and recommendation.

Dated at Washington, D.C.
this 13th day of February, 1979

s/Xavier M. Vela

Xavier M. Vela
Administrator
Wage and Hour Division

APPENDIX D

McNAMARA - O'HARA SERVICE CONTRACT ACT, 41 USC §§ 351-358 (relevant sections)

Relevant sections of the
McNamara - O'Hara Service
Contract Act, as amended,
41 USC §§ 351-358

§ 351. Required contract provisions: minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized repre-

sentative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-

bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under

this sub paragraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcon-

tractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of Title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor

thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of Title 29.

(2) The provisions of sections 352-354 of this title shall be applicable to violations of this subsection.

§ 352. Violations-Liability of responsible party: withholding payments due on contract; payment of underpaid employees from withheld payments

(a) Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefore liable for a sum equal to the amount of any deductions,

rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees form any accrued payments withheld under this chapter.

Enforcement of section

(b) In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to

carry out the provisions of this section.

Cancellations of contract; contracts for completion of original contract liability of original contractor for additional costs

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

§ 353. Law governing Secretary's authority; limitations and regulations allowing variations, tolerances and exemptions; predecessor contracts, applicability; duration of contracts

(a) Sections 38 and 39 of this title

shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnsihed, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employee would have been entitled if they were employed under the predecessor contract; Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with the regulations adopted by the Secretary that such wages and fringe beneftis are substantially at variance with those which prevail for services of a character similar in the

locality.

(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

§ 354 List of violators: prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(a) The Comptroller General is directed to distribute a list to all agencies of the

government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this lest or to any firm, corporation, partnership, or association in which persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld

under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

* * *

§ 357 Definitions

For the purposes of this chapter -

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States---.

(c) The term "compensation" means any of the payments or fringe benefits described in section 351 of this title.

(d) The term "United States" when used in a geographical sense shall include any State of the United States---.

* * *

APPENDIX E

DEPARTMENT OF LABOR REGULATIONS,
29 CFR, Parts 4 and 6 (relevant sections)

Relevant sections of 29 CFR,

Part 4, Subpart C-

Application of the McNamara - O'Hara

Service Contract Act

§ 4.146 Contract obligations after award, generally.

A contractor's obligation to observe the provisions of the Act arises on the date he is informed that he has received the award of the contract, not necessarily the date of formal execution. However, he is required to comply with the provisions of the Act and regulations thereunder only while his employees are performing on the contract, provided his records make clear the period of such performance.

* * *

§ 4.150 Employee coverage generally.

The Act, in section 2(b), makes it clear that its provisions apply generally to all employees engaged in performing work on a covered contract entered into by

the contractor with the Federal Government, regardless of whether they are his employees or those of any subcontractor under such contract.---

§ 4.151 Employees covered by provisions of section 2(a).

The provisions of section 2(a) of the Act prescribe labor standards requirements applicable, except as otherwise specifically provided, to every contract in excess of $2,500 which is entered into by the United States or the District of Columbia for the principal purpose of furnishing services in the United States through the use of service employees. These provisions apply to all service employees engaged in the performance of such a contract or any subcontract thereunder. The Act, in section 8(b) defines the term "service employee". The general scope of the definition is considered in § 4.113(b) of

this subpart.

§ 4.152 Employees subject to prevailing compensation provisions of section 2(a)(1) and (2).

Under section 2(a)(1) and (2) of the Act minimum monetary wages and fringe benefits to be paid or furnished the various classes of service employees performing such contract work are determined by the Secretary of Labor or his authorized representative in accordance with prevailing rates and fringe benefits for such employees in the locality and are required to be specified in such contracts and subcontracts thereunder. All service employees of the classes who actually perform the specific services called for by the contract (e.g. janitors performing on a contract for office cleaning; stenographic reporting) are covered by the provisions specifying such minimum monetary

wages and fringe benefits for such classes of service employees.

§ 4.165 Wage payments and fringe benefits--in general.

(a)---

(2) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions.

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* * *

§ 4.170 Furnishing fringe benefits or equivalents.

(a) General. Finge benefits specified under the Act shall be furnished, in addition to the specified monetary wages, by the contractor or subcontractor to

employees engaged in performance of the contract, as provided in the determination of the Secretary or his authorized representative and prescribed in the contract documents, or, in the event that this is not possible or practicable, the obligation to furnish such benefits "may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary." (Act, section 2(a)(2).)---

§ 4.171 Meeting requirements for particular fringe benefits.

(a)---

(b)---

(2) Some questions have been raised about the application of provisions appearing in some fringe benefit determinations which call for "1 week paid

vacation after 1 year of service with a contractor or successor." To determine when an employee meets the "after 1 year of service" test, an employer must take two factors into consideration: (1) the total length of time an employee has been in the employer's service, including both the time he has been performing on refular commercial work and the time he has been performing on the Government contract itself, and (ii) the total length of time an employee has been employed either by the present contractor or predecessor contractors in the performance of similar work on the same base. If an employee has a year of service under either the first or second consideration, he is eligible for 1 week's vacation with pay. For example, if a contractor has an employee who

has worked for him for 2 years on regular commercial work and only for 6 months on a Government service contract, that employee would be eligible for the vacation since his total service with the employer adds up to more than 1 year. Similarly, if a contractor has an employee who worked for 2 years under a janitorial service contract on a particular base for two different predecessor contractors, and only 8 months with the present employer, that employee would also be considered as meeting the "after year of service" test and would thus be eligible for the specified vacation. Work performed before, as well as after, a pertinent wage determination is issued must be counted in determining an employee's length of service.

- - -

* * *

§ 4.173 Identification of contract work

Contractors and subcontractors under contracts subject to the Act are required to comply with its compensation requirements throughout the period of performance on the contract and to do so with respect to all employees who in any workweek are engaged in performing work on such contracts. If such a contractor during any workweek is not exclusively engaged in performing such contracts, or if while so engaged he has employees who spend a portion but not all of their worktime in the workweek in performing work on such contracts, it is necessary for him to identify accurately in his records, or by other means, those periods in each such workweek when he and each such employee performed work on such contracts. In cases where contractors are not exclusively engaged in Government contract work, and there are adequate records segregating the periods in which

work was performed on contracts subject to the Act from periods in which other work was performed, the compensation specified under the Act need not be paid for hours spent on non-contract work. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the contract, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absense of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. Even where a contractor can segregate

Government fron non-Govenrment work, it is necessary that he comply with the requirements of section 6(e) of the FLSA discussed in §4.160.

* * *

Relevant section of 29 CFR, Part 6- Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal Service Contracts.

§ 6.14 Decisions and order of the Administrator.

If exceptions to the decision of the hearing examiner are taken as provided in this part, the Administrator shall upon consideration thereof, together with the record references and authorities cited in support thereof, make his decision, which shall affirm modify, or set aside, in whole or part, the findings, conclusions, and order contained in the decision of the hearing examiner, and shall include a statement of reasons or bases for the

actions taken. With respect to the findings of fact, the Administrator shall modify or set aside only those findings that are clearly erroneous. Copies of the decision and order shall be served upon the parties. Any such decision shall treat any question of recommendation for relief from the ineligible list under section 5(a) of the Act to the same extent and subject to the same limitations as provided in § 6.10(b) concerning decisions fo the hearing examiner.

* * *

No. 83-75

In the Supreme Court of the United States

OCTOBER TERM, 1983

GUILLERMO A. SAAVEDRA,
INDIVIDUALLY AND DOING BUSINESS AS
SAAGAN MOVING & STORAGE COMPANY, PETITIONER
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Wage-Hour Administrator properly construed the terms of petitioner's service contracts with the federal government according to the applicable provisions of the Service Contract Act, 41 U.S.C. 351(a)(2).

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-75

GUILLERMO A. SAAVEDRA,
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v.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-18) is reported at 700 F.2d 496. The order and judgment of the district court is not reported. The opinion of the Wage-Hour Administrator (Pet. App. C-1 1-19) is reported at [Sept. 1978-Jan. 1981 Transfer Binder] Wages-Hour Administrative Rulings (CCH) para. 31,309. The opinion of the administrative law judge (Pet. App. C 1-40) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1983. A petition for rehearing was denied on April 15, 1983 (Pet. App. B 1). The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Service Contract Act requires that every government contract in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, contain provisions assuring that the contractor's employees will receive the wages and fringe benefits generally prevailing in the contractor's locality. 41 U.S.C. 351(a)(1) and (2).[1] Pursuant to 41 U.S.C. 358, the Secretary of Labor is directed to make determinations of prevailing minimum wages and fringe benefits "as soon as it is administratively feasible to do so." The Administrator of the Wage-Hour Division within the Employment Standards Administration of the Department of Labor, to whom this responsibility has been delegated, issues wage determinations and revisions thereof on a periodic basis. See 29 C.F.R. 4.3.

Petitioner was awarded two government contracts to perform moving services in the San Francisco, California area (Pet. App. C 2). Contract "38" was awarded on June 20, 1975, for the term July 1, 1975, to June 20, 1976, and contained Wage Determination 66-190 (Rev. 9) (A.R. 469-496).[2] Contract "67" was awarded on June 7, 1976, for the term July 1, 1976, to June 30, 1977, and contained Wage Determination 66-190 (Rev. 11) (A.R. 501-527). Each wage determination contained minimum hourly rates of pay and

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[1]The goal of the Act is to prevent the government from awarding contracts to low bidders in circumstances where the low bids are based on the bidders' substandard levels of compensation. See *American Federation of Government Employees, Local 1668* v. *Dunn*, 561 F.2d 1310, 1312 (9th Cir. 1977).

[2]Wage Determination 66-190 covers San Francisco and San Mateo Counties in California. "Rev. 9" indicates that the wage determination had been revised nine times when contract "38" was awarded. ("A.R." refers to the certified administrative record filed with the district court and designated as part of the record on appeal.)

specified fringe benefits[3] for certain classes of employees (A.R. 486, 526-527). They also specified the minimum time an employee must work to qualify for each fringe benefit (Pet. App. A 10). It is uncontested that petitioner was not aware of his obligation to provide fringe benefits, and accordingly he did not do so (Pet. 43; Pet. Apps. A 3, C 13-14, C-1 7, 12).

2. Following an investigation by the Wage-Hour Division, the Deputy Solicitor of Labor filed an administrative complaint charging petitioner with failing to provide his employees prevailing fringe benefits, as set out in the wage determinations contained in contracts "38" and "67," in violation of the Service Contract Act, 41 U.S.C. 351(a)(2) (Pet. App. C 2; A.R. 1-5).

The administrative law judge held that petitioner was bound by and had violated the wage determinations set forth in his contracts, but that the amounts due from petitioner were less than the amounts requested in the administrative complaint (Pet. App. C 14-15, 37, 39-40). He concluded that the wage determinations in petitioner's contracts were ambiguous in two pertinent respects: whether the required monthly health and welfare payment in contract "38," which was poorly reproduced, was $88.35 or $38.35; and whether an employee's time spent on both federal and commercial work should be counted to establish the employee's entitlement to prevailing fringe benefits (Pet. App. C 15-20, 26-28, 34-35). Resolving both alleged ambiguities against the government, the ALJ concluded that the disputed figure could reasonably have been read as $38.35 and that only time spent on federal work should be counted toward eligibility for fringe benefits (Pet. App. C 16, 20, 26-28, 34-35). While ordering that the amounts due from

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[3]The fringe benefits included health and welfare payments, holiday pay, vacation pay and pensions (A.R. 486, 526).

petitioner be computed in accordance with his ruling, the ALJ also recommended that petitioner not be barred from receiving future federal contracts. See 41 U.S.C. 354; 29 C.F.R. 6.10(b).

3. Both parties sought review by the Wage-Hour Administrator. See 29 C.F.R. 6.11. The Administrator agreed that petitioner had violated the provisions of the Service Contract Act by not compensating his employees according to the wage determinations set forth in contracts "38" and "67." The Administrator reversed the ALJ's resolution of the alleged ambiguities in the contracts, however, because he agreed with the government that any ambiguity should not be interpreted adversely to petitioner's employees, the intended beneficiaries of the Act (Pet. App. C-1 1-19). Specifically, the Administrator held that an attentive reading of the wage determination showed that $88.35 was the correct health and welfare figure, and that, in any event, petitioner was not prejudiced by any imperfection in the printing because he neither relied on the suggested lower figure nor made any effort to clarify any patent ambiguity (*id.* at 3-8). In addition, the Administrator concluded that consideration of an employee's federal and commercial work in determining eligibility was reasonable and consistent with the Act and longstanding Department practice, as reflected by a 1970 opinion letter issued by the Wage-Hour Division and received into evidence in the case (*id.* at 8-15). Finally, the Administrator concurred in the ALJ's recommendation that petitioner not be barred from seeking future government contracts (*id.* at 18-19).[4]

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[4]Following the Administrator's decision, the case was remanded to the ALJ for computation of the amount of underpayments.

4. The district court upheld the Administrator's decision, and the court of appeals affirmed. The court of appeals held that the Administrator acted within his authority in reversing the ALJ's erroneous legal conclusions and those factual findings that he found to be clearly erroneous (Pet. App. A 4-7, 18). See 29 C.F.R. 6.14 (in reviewing the ALJ's decision, the Administrator should decide all questions of law and "shall set aside only those findings [of fact] that are clearly erroneous"). The court therefore upheld the Administrator's legal conclusion that the figure of $88.35 in contract "38" was not ambiguous. The court also noted that, even if the term were ambiguous, petitioner's suggested lower figure of $38.85 could not be accepted because it would establish "an illegal, subminimum health and welfare benefit" (Pet. App. A 14-15).

Similarly, the court of appeals sustained the Administrator's contract interpretation that an employee's federal and commercial time should be counted to establish the employee's eligibility for fringe benefits (Pet. App. A 10-14). The court concluded that the opinion letter introduced into evidence before the ALJ supported the Administrator's construction because it "parallels the Department's published methods, which count commercial time in computing eligibility for annual vacation benefits. 29 C.F.R. 4.171" (Pet. App. A 13; citation omitted). In rejecting petitioner's argument that the Administrator should have ignored the opinion letter because it was unpublished, the court observed that "[t]he administrator was not obliged to rule for Saavedra simply because the policy was unpublished. * * * Courts accord deference to an agency's reasonable and conforming interpretation of its own regulation" (*id.* at 12-13; citation omitted).

ARGUMENT

The court of appeals correctly sustained the Administrator's reasonable and well-supported construction of the wage determinations contained in the government's service contracts with petitioner. The court's resolution of the straightforward questions of contract interpretation raised by petitioner does not conflict with any decision of this Court or any other court of appeals and consequently does not warrant further review.

1. Petitioner's primary argument before this Court, as in the court of appeals, is that the Administrator improperly rejected the rule of *contra proferentem* (Pet. 43-50) and erroneously relied on an opinion letter manifesting the Department of Labor's longstanding position on the issue of computing eligibility for fringe benefits (Pet. 50-60). Neither contention is correct.

a. The general maxim that a contract should be construed against the drafter (*contra proferentem*) has been applied in the context of government contracts. See *United States* v. *Seckinger*, 397 U.S. 203, 210-216 (1970). But this rule does not override the controlling rule of construction that contractual provisions affecting the public interest, like the ones at issue here, must be construed in the manner most favorable to the public. See *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470-471 (1960); *Joy* v. *St. Louis*, 138 U.S. 1, 38, 47 (1891); *Restatement (Second) of Contracts* § 207 (1979); 4 Williston, *Contracts* § 626 (3d ed. 1961); 3 Corbin, *Contracts* § 550 (1960). Service Contract Act provisions establishing minimum wage and fringe benefit standards are designed to protect employees of federal service contractors. *Masters* v. *Maryland Management Co.*, 493 F.2d 1329, 1332 (4th Cir. 1974).[5] Thus, the court of appeals

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[5]The Service Contract Act, moreover, like other labor standards statutes, is remedial legislation and must be construed to effectuate its remedial purpose. *Midwest Maintenance & Construction Co.* v.

correctly construed these agreements in a manner designed to protect the employee-beneficiaries of the contracts. The *contra proferentem* rule espoused by petitioner simply cannot govern where overriding interests of persons other than the two parties to the contract are at stake.

In any event, even if the *contra proferentem* rule were applicable, a contract ambiguity is resolved against the drafter only where the other party has actually relied on his interpretation of the contract. *Troup Bros., Inc.* v. *United States*, 643 F.2d 719, 724 (Ct. Cl. 1980); *Framlau Corp.* v. *United States*, 568 F.2d 687, 693 (Ct. Cl. 1977). This prerequisite has not been met in this case because petitioner was "unaware that the contract required him to pay employees a health and welfare benefit or any of the other fringe benefits prov[ided] in the wage determination" (Pet. App. C-17).[6] As a result, petitioner certainly did not rely on his *post hoc* interpretation of how to determine eligibility for those fringe benefits. For this reason alone, petitioner cannot now take advantage of any alleged ambiguity in the contract.

Vela, 621 F.2d 1046, 1050 (10th Cir. 1980). Cf. *Mitchell* v. *Lublin, McGaughy and Associates*, 358 U.S. 207, 211 (Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.*); *United States* v. *Davison Fuel and Dock Co.*, 371 F.2d 705, 709 (4th Cir. 1967) (Walsh-Healey Act, 41 U.S.C. 35 *et seq.*); *Drivers, Salesmen, etc., Local Union No. 695* v. *NLRB*, 361 F.2d 547, 553 n.23 (D.C. Cir. 1966) (Davis-Bacon Act, 40 U.S.C. 276a *et seq.*); *Walling* v. *Patton-Tulley Transp. Co.*, 134 F.2d 945, 949 (6th Cir. 1943) ("Eight-Hour Law," 40 U.S.C. (1958 ed.) 321 *et seq.*). See generally *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968).

[6]The fact that petitioner calculated his wage liability by relying on an irrelevant set of figures in a different part of contract "38," rather than on the wage determination itself (Pet. 43-44; Pet. Apps. A 3, C 13), obviously does not constitute reliance on his litigation-inspired interpretation of the fringe benefit provisions of the wage determinations for purposes of *contra proferentem*.

b. The Administrator's longstanding position that both federal and commercial work must be counted to determine an employee's entitlement to the benefits secured by the Service Contract Act is entirely reasonable. Petitioner's view that only time spent on federal contract work can be counted to determine eligibility for prevailing fringe benefits is therefore without merit.[7]

As the court of appeals noted (Pet. App. A 13), the Department's interpretive regulations, which are intended to serve as illustrations of the Administrator's construction of the Act (29 C.F.R. 4.101), indicate that commercial time should be counted in computing eligibility for annual vacation benefits. 29 C.F.R. 4.171(b)(2). The same rule logically applies to other fringe benefits under the Act.

The Administrator's interpretation also is consistent with the underlying purpose of the Service Contract Act: to assure that employees of federal contractors receive the benefits generally prevailing in their locality. 41 U.S.C. 351. A wage determination under the Act is intended to reflect the practice of local employers, who presumably determine eligibility of their employees for fringe benefits on the basis of all employment with the employer. Eligibility for prevailing fringe benefits should likewise be based on all employment with the contractor. Petitioner's interpretation, on the other hand, would permit contractors to shift employees from federal to commercial work in order to keep any individual employee from spending sufficient time on federal work to qualify for prevailing benefits.[8]

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[7]Once eligibility is established, the benefits required under the Act are prorated to reflect only the percentage of time spent on federal contract work. The method of proration is not an issue before the Court (Pet. 52 n.9).

[8]It is noteworthy that the ALJ found that, when expressly set out in contract "67," the Administrator's interpretation of the eligibility provision was supported by the Act (Pet. App. C 29-31).

Finally, the Administrator's interpretation has been expressed in a Wage-Hour Division opinion letter entered into evidence below (A.R. 941-942). The Administrator and the court of appeals correctly looked to this opinion letter for guidance on the proper interpretation of the wage determinations. Indeed, the Court has stated that the Administrator's interpretations of another labor standards statute, the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Accord, *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178, 182 (1946). Cf. *Endicott-Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507 (1943) (Walsh-Healey Act); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (Walsh-Healey Act).[9]

2. Contrary to petitioner's argument (Pet. 33-43), the Administrator did not err in setting aside a number of the ALJ's conclusions. See 29 C.F.R. 6.14. In construing the relevant provisions of petitioner's service contracts, the Administrator properly resolved all pertinent questions of law. See *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922) (construction of a written instrument is solely a question of law). Indeed, the Administrator did not overturn the ALJ's factual findings in any of the instances cited by petitioner as error (Pet. 37-40). The Administrator's conclusion, for example, that petitioner

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[9]As the court of appeals correctly recognized (Pet. App. A 12), an agency may implement longstanding administrative policy in an adjudication, even if the interpretation is unpublished. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947) (new administrative policy may be implemented through adjudication). Contrary to petitioner's submission (Pet. 50-60), therefore, it is the reasonableness of the interpretation, rather than the legal effect of the Wage-Hour opinion letter itself, that is at issue here.

did not rely on the fringe benefit provisions of the wage determinations set forth in his contracts was consistent with the ALJ's findings (Pet. Apps. C 13-14, C-1 7, 12), and is conceded by petitioner (Pet. 43). Moreover, the Administrator's determination that the required health and welfare payment was unambiguously $88.35 is a legal conclusion. See *United States* v. *Sacramento Municipal Utility District,* 652 F.2d 1341, 1343-1344 (9th Cir. 1981).[10] Finally, the Administrator's reliance on prior administrative adjudicative decisions is simply an application of the legal doctrine of stare decisis, and thus was clearly within his authority.

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[10]Even assuming that the health and welfare payment figure in contract "38" was ambiguous, the Administrator correctly held that $88.35 was the applicable amount. First, both the contract (A.R. 471-472) and regulations (29 C.F.R. 4.101) require contractors to seek clarification of any obvious ambiguity. It is well-settled that this requirement is an exception to the general rule that a contract be construed against the drafter. See *Newsom* v. *United States,* 676 F.2d 647, 649 (Ct. Cl. 1982). Furthermore, as discussed above, petitioner cannot now claim that the contract should be construed in his favor, since he did not allege that he ever relied on his belated interpretation of the benefit figure. And, in any event, as the court of appeals concluded (Pet. App. A 15), adoption of the $38.35 figure propounded by petitioner would violate a published wage determination and result "in an illegal, subminimum health and welfare benefit."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

DOJ-1983-09